169

Supreme Court, U.S.
FILED

No. 10-① 10-281 AUG 24 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

JEROME K. LANNING, et al.,

Petitioners,

vs.

PATRICK PILCHER, et al.,

Respondents.

◆

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

◆

PETITION FOR A WRIT OF CERTIORARI

◆

WILLIAM M. SLAUGHTER
Counsel of Record
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
2001 Park Place, Suite 1400
Birmingham, AL 35203
Tel: 205-251-1000
wms@hsy.com

MARK D. HESS
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
2001 Park Place, Suite 1400
Birmingham, AL 35203

DOUGLAS S. LYONS
LYONS & FARRAR
325 N. Calhoun Street
Tallahassee, FL 32301

SUSAN L. KELSEY
KELSEY APPELLATE
LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Should Florida's tax discrimination scheme against non-residents, the largest and most disruptive of that of any state in the union, be shielded from constitutional scrutiny by facially equal disadvantages imposed upon a smaller class of residents owning second homes whose political opposition to such a scheme has been neutralized by offsetting advantages?

II.

Does Florida's cap on increases in the assessed value of a principal residence impermissibly interfere with interstate commerce, in contravention of the constitutional protection of a free national market in which the states are prohibited from discriminatory taxation against non-residents?

III.

Does Florida's cap on increases in the assessed value of a principal residence substantially discriminate between residents and non-residents, in contravention of the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution?

QUESTIONS PRESENTED – Continued

IV.

Does Florida's cap on increases in the assessed value of a principal residence unconstitutionally infringe on the "right to travel" guaranteed by the United States Constitution, where the cap is available only for property that is the homestead of the homeowner?

V.

If the answer to any of the first four questions presented is in the affirmative, does F.S.A. § 194.171 preclude the award of a refund to petitioners for the unlawful payment of a tax under Florida's "Save Our Homes Amendment", notwithstanding the decisions of this Court which require meaningful post-deprivation relief for the payment of an unlawful tax?

LIST OF PARTIES

Petitioners:

Jerome K. Lanning

Joyce A. Lanning

Ann C. Reese, as personal representative of the estate of Marlow Reese

Respondents:

Patrick Pilcher, in his official capacity as Property Appraiser of Walton County

Rhonda Skipper, in her official capacity as Tax Collector of Walton County

Walton County School Board

Timothy Smith, individually and in his official capacity as Property Appraiser of Okaloosa County

Chris Hughes, individually and in his official capacity as Tax Collector of Charlotte County

Okaloosa County

Okaloosa County School Board

James Zingale, in his official capacity as executive director of the Florida Department of Revenue

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

SUMMARY OF THE IMPORTANCE OF THIS CASE 2

STATEMENT OF THE CASE 5

I. General background 5

II. Procedural history 9

III. Related litigation 11

REASONS FOR GRANTING THE PETITION 12

I. The constitutional precedents of this Court compel invalidation of the SOHA annual assessment limit 15

A. SOHA unconstitutionally discriminates against interstate commerce 17

B. SOHA imposes unequal taxation in violation of the Privileges and Immunities Clause of Article IV of the Constitution 24

TABLE OF CONTENTS – Continued

Page

C. SOHA violates the right to travel guaranteed by the Constitution as a fundamental aspect of national citizenship 27

II. State courts are divided over the meaning of "discrimination" under the dormant Commerce Clause and Privileges and Immunities Clause 30

III. The Petitioners' dormant Commerce Clause claims should not have been dismissed by the Florida courts below without undertaking the fact-intensive balancing test required by *Pike v. Bruce Church, Inc.*, and *Kentucky Dep't of Revenue v. Davis* 35

IV. F.S.A. § 194.171 cannot bar retroactive relief 37

CONCLUSION 38

INDEX TO APPENDICES

Appendix A Florida First District Court of Appeal Opinion .... App. 1

Appendix B Judgment of Dismissal .... App. 8

Appendix C Florida Supreme Court Decision.... App. 46

Appendix D Constitutional and Statutory Provisions Involved .... App. 47

TABLE OF CONTENTS – Continued

Page

Appendix E Statistical Analysis of SOHA's Effect on Non-Resident Taxpayers .... App. 52

Appendix F Second Amended Complaint .... App. 58

TABLE OF AUTHORITIES

Page

CASES:

Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 17, 18

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 18

Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) 28

Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978) 29

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 20

Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) 20

Brimmer v. Rebman, 138 U.S. 78 (1891) 7

Bruner v. Hartsfield, 23 So. 3d 192 (Fla. 1st DCA 2009) 11

Bruner v. Hartsfield, Slip Copy, No. SC09-2292, 2010 WL 2079907 (Fla. May 24, 2010) 11

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564 (1997) 19

Citizens for Uniform Taxation v. Northport Public Sch. Dist., 608 N.W.2d 480 (Mich. App. 2000) 30, 31

Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc., 579 S.E.2d 200 (Ga. 2003) 30

TABLE OF AUTHORITIES – Continued

Page

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 17

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 33

Deluccio v. Havill, 25 So. 3d 31 (Fla. 1st DCA 2009) 12

Dep't of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994) 17

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 34

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 38

Hibbs v. Winn, 542 U.S. 88 (2004) 35

Homier Distrib. Co., Inc. v. City of Albany, 681 N.E.2d 390 (N.Y. 1997) 31, 32

In re CIG Field Servs. Co., 112 P.3d 138 (Kan. 2005) 31

Kentucky Dep't of Revenue v. Davis, 553 U.S. 328 (2008) 35, 36

Lanning v. Pilcher, 16 So. 3d 294 (Fla. 1st DCA 2009), *rev. denied*, 37 So. 3d 847 (Fla. 2010) 1, 12, 37

Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010) 35

Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998) 24, 25

TABLE OF AUTHORITIES – Continued

Page

Markham v. Comstock, 708 N.Y.S.2d 674 (N.Y. App. Div. 2000) 30, 31, 32

McKesson Corp. v. Florida Alcohol and Tobacco Div., 496 U.S. 18 (1990) 38

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 23, 33

Nordlinger v. Hahn, 505 U.S. 1 (1992) 10, 15, 16

Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 17

Op. of the Justices to the House of Representatives, 702 N.E.2d 8 (Mass. 1998) 32

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .... *passim*

Reinish v. Clark, 765 So. 2d 197 (Fla. 1st DCA 2000), *rev. denied*, 790 So. 2d 1107 (Fla. 2001), *cert. denied*, 534 U.S. 993 (2001) .... *passim*

Rubin v. Glaser, 416 A.2d 382 (N.J. 1980) 31

Saenz v. Roe, 526 U.S. 489 (1999) 4, 27

Sanifill, Inc. v. Kandiyohi County, 559 N.W.2d 111 (Minn. App. 1997) 32

Stanek v. Kenai Peninsula Borough, 81 P.3d 268 (Alaska 2003) 30

Sup. Ct. of N.H. v. Piper, 470 U.S. 274 (1988) 26

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) 24

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION:

U.S. Const., Art. I, § 8 (dormant Commerce Clause) .... *passim*

U.S. Const., Art. IV, § 2 (Privileges and Immunities Clause) .... *passim*

UNITED STATES STATUTES:

28 U.S.C. § 1257 1

28 U.S.C. § 1341 .... 12, 34

42 U.S.C. § 1983 9

UNITED STATES SUPREME COURT RULES:

Rule 10 1

FLORIDA STATUTES:

F.S.A. § 193.155 6

F.S.A. § 194.171 .... 10, 11, 37, 38

CALIFORNIA CONSTITUTION:

Cal. Const., Art. 13A § 2 27

OTHER AUTHORITIES:

Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause After United Haulers*, 115 Tax Notes 1037 (2007) 14

Page

F. Ferreira, *You Can Take It With You: Proposition 13 Tax Benefits, Residential Mobility, and Willingness to Pay for Housing Amenities*, 94 J. Pub. Econ. 661 (2010) 18

M.H. Stohs et al., *Tax Policies and Residential Mobility*, 4 Int'l Real Estate Rev. 95 (2001) 18, 19

Mark Haveman & Terri A. Sexton, Lincoln Institute of Land Policy, *Property Tax Assessment Limits: Lessons From Thirty Years of Experience* 9 (2008) 15, 34

N. Wasi & M. White, *Property Tax Limitations and Mobility: Lock-In Effect of California's Proposition 13*, 2005 Brookings-Wharton Papers on Urban Affairs 59 19

T. Berger et al., *Another Look at the Capitalization of Interest Subsidies: Evidence from Sweden*, 32 J. Money, Credit & Banking 199 (2000) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

◆

OPINIONS BELOW

The opinion of the highest state court to review the merits appears in the Appendix to the Petition and is reported at *Lanning v. Pilcher,* 16 So. 3d 294 (Fla. 1st DCA 2009), *rev. denied,* 37 So. 3d 847 (Fla. 2010). App. A.

◆

JURISDICTION

The date on which the highest state court reviewed this matter was August 26, 2009. The Florida Supreme Court denied discretionary review of this case on May 26, 2010, *Lanning v. Pilcher*, 37 So. 3d 847 (Fla. 2009). App. C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c) as "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution and the Florida constitutional and statutory provisions at issue in this matter are set out fully in Appendix D attached hereto.

◆

SUMMARY OF THE IMPORTANCE OF THIS CASE

This Court should grant this Petition for at least three reasons. First, as discussed below, there is a profound disagreement among the states as to the meaning of "discrimination" in the context of similar state taxation laws. This disagreement centers on the degree to which facially equal treatment between non-residents and a particular class of residents can be used to shield constitutional scrutiny of a state's discriminatory tax scheme that significantly interferes with interstate commerce. Second, as discussed below, this case presents a question of great importance affecting the national housing market that cannot be resolved by lower federal courts because of the Tax Injunction Act. Third, the SOHA assessment cap (defined *infra*) requires the review of this Court as it violates the dormant Commerce Clause, the Privileges and Immunities Clause and the right to travel.

The SOHA assessment cap violates the dormant Commerce Clause by discouraging travel to and from

Florida, as Florida non-resident homeowners are financially incentivized to become Florida residents, and Florida residents are even more financially incentivized to preserve their accrued benefit and remain Florida residents. Furthermore, a similarly situated non-resident is at a significant financial disadvantage when compared to a resident would-be purchaser of the same piece of property, as the resident can spend more money up front, knowing that his tax benefit will more than make up the difference over the life of the investment. At the same time, a resident owner of a second home, contrary to the decisions of the Florida courts, is not treated the same as a non-resident owner of a second home, because the resident owner's tax burden on his primary home is greatly diminished by a back-door subsidy gleaned from the higher taxes paid by non-resident homeowners.

The SOHA assessment cap violates the Privileges and Immunities Clause of Article IV in that non-residents cannot avail themselves of the benefit, while residents receive a subsidy toward their overall tax burden. Because of the residency requirements for homestead status in Florida, there are two distinct classes of homeowners: those who reside in Florida for more than six months, and those who reside in Florida for less. These classes receive significantly disparate treatment, and far less restrictive means could be implemented by Florida to achieve the intended legitimate state interest – stability of the family home.

The SOHA assessment cap violates the constitutional right to travel. According to the jurisprudence of this Court, the right to travel includes at least three components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Because of the durationally-weighted benefit created by the assessment cap, the disparity of the treatment of similarly situated (except for their place of residency) homeowners, and the impediments created by the cap to relocating *from* Florida to another state, the cap violates all three components of the right to travel.

Finally, Petitioners were denied the opportunity to have their day in court. The Florida court ignored the facts of the case, and refused to entertain any sort of meaningful contest of the legitimacy of the SOHA assessment cap. At a minimum, this cause should be remanded to the Florida courts for a hearing conducting the balancing test mandated by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

◆

STATEMENT OF THE CASE

I. General background.

Florida's unique maritime environment draws countless numbers of people to its beaches every year, either as visiting tourists, non-resident owners of some sort of second home at the beach, or permanent residents. As a result, Florida's housing stock is occupied, to a degree unmatched elsewhere in the country, by temporary and part-time residents. In 2000, for example, nearly half a million homes in Florida were used primarily for vacation or other temporary use, twice as many as in California, the runner-up. U.S. Census, Historical Census of Housing Tables – Vacation Homes.

Florida authorizes county governments to collect an annual tax on residential real property, with the amount of the tax determined by the application of a tax rate, or "millage", to the assessed value of the property. Counties may set their own millage rates, subject to a limit imposed by the State. Assessment of the value of property is determined according to state law, which generally requires that the property be reassessed annually at the current market value. In addition, state law dictates that the first $25,000 of value of "homestead" residences may not be taxed by the counties.

In 1995 Florida voters adopted, via ballot initiative, the "Save Our Homes Amendment" which was added as Art. 7, § 4(c) to the Florida Constitution (said amendment, together with its implementing statute, § 193.155, Fla. Stat. (2006), being herein collectively referred to as "SOHA"). SOHA limits the assessed value of any "homestead" property by disallowing an annual assessment increase of more than 3% over the prior year's assessment. Thus, for instance, a homestead assessed in 1995 at $100,000 could not be assessed at more than $103,000 in 1996, irrespective of any actual change in market value. With respect to both the $25,000 exemption and the SOHA assessment cap, Florida law defines a "homestead" as the "permanent residence" of the owner. Accordingly, part-time residents, visitors, and those living full-time in Florida but intending a return elsewhere, are all ineligible for both the base exemption and the assessment cap.

Between 1995 and the time this suit was filed in 2007, the value of Florida residential real property increased dramatically, with some Florida areas increasing more than 150% in market value during the period from 2000-2006.[1] Even today, the average Florida home is worth considerably more than it was worth at the turn of the millennium, and prices have increased since the beginning of 2010. Since property tax revenues increase along with increases in assessed value, Florida enjoyed something of a revenue "bubble" during this period. Local property tax revenues more than doubled between 1997 and 2007, to nearly $27 billion. Tax Policy Center, *Tax Facts: State and Local Property Tax Revenue, Selected Years 1977-2007*. Total U.S. property tax revenues (including Florida) increased by only about 50% during the same time frame. *Id.* As a result of the SOHA assessment cap, however, "permanent residents" of Florida property accounted for a disproportionately small fraction of this revenue increase. Even as market values were skyrocketing, assessed values of homestead properties crept upwards by only 3% per annum, resulting in an immense amount of wealth going untaxed each year. By 2006, according to a University of Florida estimate, nearly $400 billion in homestead value was untaxed, which translated to an annual tax savings of about $8 billion for Florida permanent residents.

---

[1] According to the home price indices established by Standard & Poor's, homes in Miami and Tampa increased in value by 30% in 2004 alone.

The value of the SOHA assessment cap is also geographically concentrated in beachfront property and residences in high-value suburbs where the largest appreciation in market value has occurred. In many such areas a large part of property tax revenues, often well in excess of half of total revenues, are collected from properties occupied by non-residents that that do not qualify for homestead status. The cumulative effect of SOHA has been a discriminatory transfer of Florida's property tax burden to out-of-state owners of residential property.

SOHA exempts from real property taxation that portion of the market value of a homestead property in excess of the sum of (i) the prior year's assessed value and (ii) such additional amount for the current year as the change in market value may allow, not to exceed 3% of the prior year's assessment. The operative effect of SOHA is graphically demonstrated in the chart contained at App. E, p. 56. This chart demonstrates the cumulative effect of the differential taxation of residences respectively acquired for $200,000 in 1995 by a non-resident and by a resident entitled to homestead status. Using this example, in 2006 – some eleven years after SOHA was implemented – the non-resident's property is assessed for tax purposes at a value of $449,373, while the homestead property is assessed at $248,172 (also reflecting the $25,000 base exemption). Assuming a constant millage rate for the two property owners, the non-resident owner pays property taxes equal to 198% of the property taxes paid by the homesteader. Petitioners submit that this Court can take "common sense notice" that the non-resident's governmentally supported needs and services does not equal those consumed by the permanent resident.

The second chart at App. E, p. 57, illustrates the potentially dystopian inequality that will exist in the year 2026 if SOHA continues to operate unchecked. Assuming continued real estate appreciation at the same average annual rate that Florida has experienced for the last 30 years, non-residents who acquired property in 1995 for $200,000 will pay tax in 2026 on an assessed valuation of $1,921,948, while the similarly situated Florida homesteader will pay tax on an assessed valuation of only $468,378. Notwithstanding the dramatic disparities in tax burden that have resulted and will result from SOHA, the

Florida courts below denied Petitioners the opportunity to present any facts that showed the extent to which SOHA now discriminates against interstate commerce and undermines the constitutional right to travel of Florida's non-resident property owners.

II. Procedural history.

On July 26, 2007, Petitioners, a class of Alabama citizens who also own property in Florida but because of their status as part-time residents are not entitled to the SOHA assessment cap, filed and served their Second Amended Complaint. App. F, p. 58. The Second Amended Complaint stated claims challenging the constitutionality of the SOHA 3% assessment cap on behalf of the class of all non-residents of Florida who owned residential property in Florida. The Second Amended Complaint alleged that the SOHA cap violated the dormant Commerce Clause of the U.S. Constitution (because of its impact on interstate commerce), the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Art. IV, and the constitutional right to travel. Petitioners sought declaratory relief and supplemental retroactive relief (Count I), alternatively, relief under Title 42 U.S.C. § 1983 (Count II), and declaratory judgment and supplemental prospective relief. Respondents moved to dismiss the Second Amended Complaint on the grounds that it failed to state a cause of action on which relief could be granted. A hearing was held in the Circuit Court of Leon County, Florida on August 6, 2007, and on October 18, 2007, that court entered a Final Judgment of Dismissal With Prejudice as to all claims. App. B, p. 8. In that judgment the trial court relied exclusively, and the Petitioner contends erroneously, on *Reinish v. Clark*, 765 So. 2d 197 (Fla. 1st DCA 2000), *rev. denied*, 790 So. 2d 1107 (Fla. 2001), *cert. denied*, 534 U.S. 993 (2001), and *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

On December 21, 2007, Petitioners filed and served their Notice of Appeal of Final Order. A hearing was held before the Florida First District Court of Appeal, and on August 26, 2009, the First District Court of Appeal affirmed the ruling of the court below, holding that *Reinish* and *Nordlinger* were determinative of the issues presented, holding that F.S.A. § 194.171 did not preclude a constitutional attack on a property taxation scheme, and ignoring the factual allegations of the Second Amended Complaint in their entirety. Pursuant to a motion to clarify filed by Respondents, the First District Court of Appeal modified its earlier opinion to hold that, while F.S.A. § 194.171 did not deprive the Florida trial court of subject matter jurisdiction over the action, it did preclude the award of any refund or other retrospective relief, even if Petitioners were ultimately successful on the merits of their claim. After holding the case for nearly a year, on May 26, 2010, the Florida Supreme Court entered an Order declining to exercise its discretion and review this action. App. C, p. 46.

III. Related litigation.

The present case is the first in a trio of class action legal challenges to SOHA. The second challenge was initiated by newly-arrived residents of Florida who were qualified homesteaders, but filed suit contesting the durational impact of SOHA and its "Amendment One," which allows for the portability of an existing homesteader's tax shelter to new in-state purchases. That case, like this one, was dismissed by the Leon County Circuit Court for failure to state a claim for which relief could be granted; the judgment of the Circuit Court was affirmed by the First District Court of Appeal. *See Bruner v. Hartsfield*, 23 So. 3d 192 (Fla. 1st DCA 2009). When the Florida Supreme Court issued an order denying a petition for review on May 24, 2010, *see Bruner v. Hartsfield*, Slip Copy, No. SC09-2292, 2010 WL 2079907 (Fla. May 24, 2010), the *Bruner* plaintiffs commenced the preparation of a Petition for Writ of Certiorari to this Court, which will be filed on or about the same date as the instant Petition. The third challenge involved out-of-state homeowners in Florida who are not entitled to homestead their property, and are contesting not only the SOHA assessment cap, but also the portability of the accrued advantage afforded existing homesteaders at the time of the passage of "Amendment One." That case was dismissed by the Circuit Court of Leon County for want of subject matter jurisdiction, which held that the "non-claims" function of F.S.A. § 194.171 barred contest of a real property tax assessment after the passage of 60 days from the date of the assessment. The First District Court of Appeal reversed the decision of the trial court, remanding for further proceedings and holding that F.S.A. § 194.171 does not preclude constitutional challenges to a taxation scheme. *See Deluccio v. Havill*, 25 So. 3d 31 (Fla. 1st DCA 2009). In light of the cursory treatment the Florida state courts have given both the *Lanning* and *Bruner* matters, it is reasonable to expect that the *Deluccio* plaintiffs will, in relatively short order, also be in position to file a Petition for Writ of Certiorari to this Court. The attention of this Court is called to these other cases because of the possibility of their consolidation.

◆

REASONS FOR GRANTING THE PETITION

While other states also deny homestead benefits to non-residents, the SOHA limitation on the assessed value of homestead property, together with the unique environment of Florida and the secular trend of increasing land prices, have resulted in tax discrimination by Florida against the citizens of other states of a scope that threatens serious harm to the national economy and the fundamental equality of national citizenship. The Tax Injunction Act, 28 U.S.C. § 1341, curtails the power of lower federal courts to restrain discriminatory state taxation, leaving this Court as the only guardian of the historical jurisprudence that has prevented the states from favoring their citizens at the expense of the equality promised by national citizenship. While other states have tax schemes that discriminate against non-residents, Florida's extreme dependence on revenues from non-residents and the disruptive scope of its discrimination make this case a unique opportunity for this Court to reaffirm its guidance upholding free national markets and equal national citizenship and to resolve differences among state appellate courts in their effort to follow such guidance.[2]

Florida's taxation of residential property annually transfers billions of dollars in revenue from unrepresented part-time residents to the citizens of Florida who voted for the SOHA amendments. As a matter of general impression, these transfers offend basic notions of tax equity; Florida voters award themselves a smaller fraction of the property tax burden in exchange for a larger, year-round share of local services. More importantly as a matter of constitutional law, these policies threaten the basic notion of fair reciprocal treatment and common community upon which the federal union rests. SOHA distorts local and national real estate markets in Florida; given the magnitude of non-residents' investment in Florida real estate, it adversely affects the movement of people into and out of Florida and the interstate real estate market; and it encourages other states to follow the bad example of Florida in attempting to discriminate against non-residents in favor of their own citizens.

---

[2] Except for the thirteen original states, Florida, Texas, Alaska and Hawaii are the only states admitted to the union that, prior to their admission, had a foreign geopolitical identity not carved out of a larger possession of the United States. Perhaps a perceived risk of the continuity of foreign law or political practice caused Congress to attach the express condition to Florida's admission "that in no case shall non-residential proprietors be taxed higher than residents". 4 Stat. 789, 790 (28th Cong. 1845). It is ironic that 150 years later Florida, through a combination of no income taxes, heavy sales taxes and discriminatory property taxes, has successfully shifted its tax burden disproportionately to non-residents.

It should be further recognized that SOHA distorts the "market for good government" by allowing Florida permanent residents to obtain government services at a bargain price relative to other states that lack comparably large tax-shifting systems. This bargain shields Florida officials from the competition to which federalism would otherwise make them subject; officials can perform poorly and still be judged successful, since they have delivered more for less. *See* Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause After United Haulers*, 115 Tax Notes 1037, 1044 (2007).

SOHA likely contributed to the so-called "bubble" in Florida real estate values by automatically inflating the value of homes whose value is expected to rise. Since the size of the tax benefit depends on the degree to which the market value of the home increases faster than the assessed value, SOHA adds an automatic multiplier to expectations of rising home values: the greater the expected future rise in price, the greater the tax benefit, and thus the greater the expected future increase in price, and so on. When the housing market slowed, this premium collapsed, contributing to the rapid deflation of home values.

Correcting the pernicious effects of SOHA is no less relevant now that the Florida housing market is no longer rising at a precipitous rate. For one reason, SOHA continues to shelter many homestead owners from a full and fair participation in the real estate market that involves both risks as well as benefits. Housing prices remain above their 2000 levels, and in many cases values had risen so dramatically that, at 3% per year, assessments are still only creeping upwards towards true market value. Mark Haveman & Terri A. Sexton, Lincoln Institute of Land Policy, *Property Tax Assessment Limits: Lessons From Thirty Years of Experience* 9, 20 (2008). Next, as the housing market stabilizes and begins to recover, it is vital that factors contributing to the cycle of boom and bust be reformed, lest the cycle begin again. The removal of inefficiencies in the housing market would contribute to overall economic recovery.

I. The constitutional precedents of this Court compel invalidation of the SOHA annual assessment limit.

All of Petitioners' constitutional claims were dismissed by the Florida courts below on the authority of *Reinish v. Clark, supra*, and *Nordlinger v. Hahn*, *supra*. Reliance on *Reinish* was misplaced because it analyzed only the validity of the $25,000 homestead exemption and not the SOHA 3% assessment cap, and reliance on *Nordlinger* was misplaced because it considered only the applicability of the federal Equal Protection Clause to California's Proposition 13 which imposed the same assessment limitation on all property, commercial and residential, without discrimination among residents and non-residents. Pretermitting the claimed state interest in SOHA of encouraging home ownership, the governing rationale for denying the Petitioners' constitutional claims was the facial equality of taxation between the class of non-residents who could not claim homestead status for their homes in Florida because their permanent residences were in another state and the class of residents who could not claim homestead status for a second home in Florida because that status had already been claimed for their Florida permanent residences. "The Florida exemption provides no greater, or lesser, benefit to Florida owners of secondary homes than it does to the Reinishes and any other non-residents." *Reinish*, 765 So. 2d at 210.

When the maintenance of a free national market or the protection of the equality of national citizenship is at issue, the fact that residents are also burdened to some degree will not shield a discriminatory scheme against non-residents from constitutional scrutiny if the burden on residents is neutralized by offsetting benefits or diffused through the population or economy in a manner that will not engender effective political response. The collateral effect of SOHA on the relatively small class of residents owning second homes should not immunize SOHA from

(i) the protection given the national real estate market by the dormant Commerce Clause of the Constitution, (ii) the requirement of the Privileges and Immunities Clause of Article IV, § 2 of the Constitution that substantial equality of treatment be given to resident and non-resident taxpayers, and (iii) the freedom from discrimination enjoyed by non-residents under the constitutional right to travel.

A. SOHA unconstitutionally discriminates against interstate commerce.

Pretermitting until later the question of whether SOHA burdens residents owning second homes in the same way that it burdens non-residents, SOHA plainly discriminates against interstate commerce. A state tax can survive scrutiny under the dormant Commerce Clause only where it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The test of "discrimination" turns on whether an enactment discriminates against interstate commerce itself, not any given market actor. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 724 (Fla. 1994). A tax discriminates against interstate commerce wherever, if adopted by all states, "commerce among the States would be deterred," *Am.*

Trucking, 483 U.S. at 284, or the enactment would "interfere[ ] with free trade," *Armco, Inc. v. Hardesty*, 467 U.S 638, 644-45 (1984). Thus, for example, this Court has held that a flat tax on the privilege of operating trucks on a state's highways, imposed equally on all drivers, is discriminatory, because if adopted widely such a scheme would lead businesses to prefer to operate solely in one state, thereby diminishing commerce among the states. *Am. Trucking*, 483 U.S. at 283-85.

SOHA is unconstitutional under this standard because it already deters, and if universally adopted by other states would further deter, commerce among the states. SOHA discourages Florida residents from establishing ties to other states that might jeopardize their ability to claim a continuing permanent residence in Florida. Since loss of permanent residence status for even one year entails the sacrifice of all of the accumulated benefits from prior years' assessment limits, this is a powerful incentive for Floridians to avoid dividing their affairs between Florida and elsewhere. In addition, SOHA burdens interstate commerce by diminishing interstate relocations. Assessment caps "lock in" existing homeowners by imposing a large increase in annual property tax upon the purchase of a new home.[3] Under the version

---

[3] Several econometric studies have found this effect in other states. F. Ferreira, *You Can Take It With You: Proposition 13 Tax Benefits, Residential Mobility, and Willingness to Pay for Housing Amenities*, 94 J. Pub. Econ. 661, 661-73 (2010); M.H.

(Continued on following page)

of SOHA at issue in this litigation, the assessed value of a home is reset at purchase.[4] The decision to relocate therefore results in a large increase in annual property taxes. Accordingly, if Florida's property tax, including SOHA, were enacted nationally, there would be far less interstate movement of persons. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997) (holding that "commerce" at issue in the dormant Commerce Clause includes movement of persons as well as goods). It is true that this lock-in effect also discourages strictly within-Florida relocations. However, the fact that a statute distorts *intra*state commerce does not change the fact that it also unconstitutionally burdens *inter*state commerce. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-95 (1994).

Stohs et al., *Tax Policies and Residential Mobility*, 4 Int'l Real Estate Rev. 95, 95-117 (2001); N. Wasi & M. White, *Property Tax Limitations and Mobility: Lock-In Effect of California's Proposition 13*, 2005 Brookings-Wharton Papers on Urban Affairs 59, 59-97.

[4] A constitutional amendment, first effective in 2008, and the subject of the *Bruner* and *Deluccio* cases discussed above, now permits homesteaded owners to carry their old assessment with them to a new home, subject to some limitations. This scheme, if anything, exacerbates SOHA's discrimination against interstate commerce. Under portability, a purchaser of a new home will pay radically different property taxes depending on whether her prior home was in Florida, and subject to a low assessment, or in another state. If SOHA with portability were enacted nationally, there would be a dramatic incentive for homeowners to relocate only within their own state.

In yet a third way SOHA reduces interstate commerce by putting second-home buyers at a price disadvantage relative to purchasers of a permanent residence. Under SOHA, a homeowner who can sell to a buyer who will use the property as his permanent residence can charge a premium, reflecting the value of the tax benefit the buyer will enjoy.[5] Thus, a second-home purchaser interested in a home under a SOHA regime would have to overpay for the property to match a bid from a comparable permanent-residence buyer. The expected result would be a decline in second-home purchases, including many purchases that would cross borders.

In addition to reducing the flow of interstate commerce, SOHA also facially discriminates against interstate commerce in a second manner. This Court has also held that a tax statute is facially discriminatory for purposes of this rule when it "forecloses tax neutral decisions." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331 (1977). Thus, a "discriminatory" tax need not impose burdens uniquely on out-of-state residents; it is sufficient that the tax significantly affect a taxpayer's choice of the state in which he will conduct his business. *Cf. Baldwin v. G.A.F.*

---

[5] This effect has been observed with other forms of housing subsidy. *See* T. Berger et al., *Another Look at the Capitalization of Interest Subsidies: Evidence from Sweden*, 32 J. Money, Credit & Banking 199, 199-217 (2000) (finding that original owners captured nearly all of the studied housing subsidy by increasing their prices offered to buyers eligible for the subsidy).

Seelig, Inc., 294 U.S. 511, 527 (1935) (striking down non-tax statute having the effect of "neutraliz[ing] advantages belonging to the place of origin"). For the reasons explained above, SOHA's assessment cap strongly influences consumer choices about where and when to purchase a principal residence, vacation home, or investment property.

Turning now to the question of equal treatment of residents and non-residents, the Florida courts below erroneously concluded that the SOHA assessment cap for homestead property did not discriminate against non-residents because it also facially applied to Florida residents who owned second homes – that is, SOHA denies equally the benefit of the assessment cap to all second homes whether owned by Florida residents or non-residents. This conclusion is not true either as a matter of law or fact with respect to Florida residents who own second homes. Equality between residents and non-residents is negated by the coordinated operation of SOHA, the Florida system for levying property taxes for school purposes, and the Florida Education Finance Program ("FEFP") which provides substantially uniform funding per pupil in all Florida counties by using state funds derived primarily from sales taxes to fill any funding gap between (i) the amount provided by local property taxes and (ii) each county school system's share of the total education expenditures authorized under the FEFP in each fiscal year.[6]

Every Florida resident who owns a second home must also own a homestead, else the second home would qualify as his homestead. In his capacity as a homestead owner, the resident owner of a second home benefits from any allocation of tax revenues that reduces his share of the school tax burden in the district where his homestead is located. The revenues of the State of Florida available to fund the FEFP, derived principally from the state sales tax, are finite and cannot be stretched without limit to compensate for shortfalls in that substantial portion of the FEFP funded by local school property taxes. To the extent that the yield of school taxes is increased by the higher assessment values borne by property owned by non-residents, this increase reduces FEFP's demand for state funds and allows Florida to keep the rates of school taxes on homestead property lower than such rates would otherwise be. This arrangement represents a substantial compensating benefit to Florida owners of second homes that is not available to non-residents. While this compensating benefit may not fully offset the higher property taxes imposed by

---

[6] The final FEFP calculation of school property tax funding in relation to state funding in each county for the period 2006-2007 during which this case began is made available by the Florida Department of Education on the Internet at http://www.fldoe.org/fefp/offrfefp.asp. The FEFP program continues in effect essentially as it was in 2006.

SOHA on the second homes of Florida residents, it nevertheless constitutes a substantial benefit for such residents obtained by significant discrimination against non-residents.

Thus, SOHA discriminates in yet a third way against interstate commerce, because, when combined with FEFP and other aspects of Florida law, it effectively imposes higher taxes only on non-residents. *West Lynn Creamery, Inc.*, 512 U.S. at 194-97 (holding that combination of general tax with refund given only to in-state group discriminated against interstate commerce). SOHA reduces the net tax burden of all Florida homestead owners, including those who own second homes, by shifting some of that burden to non-residents. In effect, although SOHA does impose higher taxes on second-home owners whose principal residence is in Florida, as well as on those whose principal residence is elsewhere, the Florida residents receive a rebate of their higher tax in the form of reduced tax on their principal residences as a result of the subsidy to the FEFP provided by the non-residents. As in *West Lynn Creamery*, only non-Floridians bear the full burden of SOHA's differential treatment.

It must be acknowledged that this Court has sometimes suggested that "the existence of major in-state interests adversely affected . . . is a major safeguard against legislative abuse." *Id.* at 200 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)). That factor, though, cannot save an otherwise unconstitutional taxing scheme where the in-state interests affected have been mollified by being granted another benefit, or where the in-state interests are so diffuse that they cannot be expected effectively to oppose the challenged enactment. *West Lynn Creamery*, 512 U.S. at 196-97 (rejecting claim that in-state milk producers would be effective check on uniform milk tax coupled with subsidy for in-state milk producers); *id.* at 203-04 (rejecting argument that in-state consumers were an effective check). The effect of SOHA is highly concentrated in coastal and other premium-value counties, while the permanent residences of Floridians who own second homes are scattered throughout the state. This results in strong support from both the residents and public officials in areas deriving high taxes from non-residents and little to no opposition from areas not materially affected by the denial of the assessment cap to second homes.

B. SOHA imposes unequal taxation in violation of the Privileges and Immunities Clause of Article IV of the Constitution.

The SOHA assessment cap violates the Privileges and Immunities Clause by employing Florida's taxing power in a manner that substantially discriminates between residents and non-residents. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 295-98 (1998); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). "[W]hen confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Lunding*, 522 U.S. at 298.

Reinish concluded that SOHA did not discriminate against non-residents because "their Florida real property is treated the same as any vacation or seasonal homes of Florida residents, who are taxed upon the full value of those properties." *Reinish*, 765 So. 2d at 208. But a Floridian with a vacation home receives the benefit of the SOHA exemption as to at least one Florida property, while the out-of-state resident receives no benefit at all from the statute. Further, as demonstrated in Section I.A. hereof, the Floridian enjoys a lower overall tax burden thanks to the increased taxes paid by non-residents, while the non-resident must pay his home-state taxes as well as a disproportionate share of Florida's.

Moreover, SOHA creates two classes of Florida residents: those who have lived in the state for less than six months and those who have lived in it more than six months. Among the second class there are two subclasses: those who own a primary residence in Florida and those who do not. Those who do own a Florida primary residence and have lived in the state more than six months are the most favored class, for they can declare homestead status and offset the artificially high taxes on their second homes with tax savings on their primary residences. The Privileges and Immunities Clause requires a single national citizenship, not a balkanized classification and subclassification of favored and disfavored citizens.

The Florida courts were also wrong in concluding that, even if there were discrimination against nonresidents, Florida could offer a "substantial reason" for the difference in treatment. *Reinish*, 765 So. 2d at 208. The *Reinish* court held that a property tax exemption only for permanent residences assists with the costs of "primary shelter" and thereby encourages the "stability of the basic homestead." *Id.* This argument assumes that the benefits of the tax exemption are passed on to purchasers, rather than simply increasing the value of owning (and therefore the cost of purchasing) a primary residence. If the value of the tax subsidy is fully capitalized in the price of homes, then the exemption has no net effect at all on the number of new homeowners.

To the extent that the *Reinish* court meant to argue that SOHA and related provisions preserve stability by keeping existing homeowners in place, that argument fails because Florida clearly has many less restrictive means for obtaining that goal. "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1988). If preventing dislocation is the only goal, the State could offer exemptions or deferrals to households experiencing economic hardship. It could defer all tax collections until sale and, if it wishes, collect interest on the deferred tax at that time. Or it could simply extend SOHA benefits to include all residential property. California, among other states, has taken the latter approach. Cal. Const., Art. 13A § 2(b).

C. SOHA violates the right to travel guaranteed by the Constitution as a fundamental aspect of national citizenship.

First, SOHA unconstitutionally deprives Petitioners of the Privileges and Immunities of national citizenship by infringing on the right to travel freely across the nation. As this Court has explained:

> The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999). SOHA infringes on all three components of the right to travel.

To begin with the most obvious violation, SOHA denies travelers who make a permanent home in Florida the right to be treated like other, long-term citizens, because it grants a benefit that varies depending on the duration of residency. In the typical rising housing market (such as the one at issue in

Petitioners' claims for retrospective relief), the longer a homeowner enjoys the SOHA limits on increases in assessed value, the greater the discount he receives on the true value of his home. Yet, as this Court has held, a state provision that "grant[s] incrementally greater benefits for each year of residence" is inconsistent with the right to travel. *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 905 (1986).

Next, SOHA violates the second *Saenz* component by disadvantaging those who reside in Florida but choose not to make it their permanent home. Because eligibility for SOHA turns on the intent to establish a "permanent residence," it is possible that two individuals identical in all respects except their subjective intent to call a Florida property their permanent home will receive markedly different tax treatment.

It is true that this Court has upheld differential treatment of visitors where necessary to limit access to a scarce state resource, such as state-funded higher education, to "bona fide residen[ts]". *Soto-Lopez*, 476 U.S. at 903, n.3. But SOHA is not a college or a park that might be crowded by overuse; it is simply the opportunity to pay less taxes. If SOHA discrimination could qualify as "public assistance" based on bonafide residence, as the Florida court seemed to suggest, *Reinish*, 765 So. 2d at 209, then the right to travel would have no meaning, since by similar logic any differential treatment of a state's permanent residents could be justified as limiting the benefit of more favorable treatment only to those residents.

Lastly, SOHA penalizes citizens' choices to leave Florida, and distorts their decisions about how to divide their time between Florida and another state. A Floridian who shifts his permanent residence to another state, and then returns, sacrifices all of his accumulated SOHA benefits, even if he does not sell his Florida home. That is because in the year or years in which he calls another state his permanent residence, his Florida property will be assessed at its then-current value. If he then returns to Florida, he may again get the benefits of SOHA going forward, but he will now be taxed on any accumulated equity. As a result, SOHA is a powerful disincentive to leaving Florida for any who might consider a return. Similarly, to the extent that objective factors such as time spent in a home are probative of the "permanent residence" determination, SOHA discourages Florida residents from traveling to a second home elsewhere.

The Florida courts were also mistaken, *Reinish*, 765 So. 2d at 209, in relying on this Court's decision in *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978), to find no violation of the right to travel. *Baldwin* held that opportunities to hunt elk are not so fundamental to national citizenship that differential treatment of residents and non-residents would "offend the Privileges and Immunities clause." *Id.* at 387-88. But *Baldwin* itself states that "ownership and disposition of privately held property within the State" is one of the rights that *is* protected by the Clause. 436 U.S. at 383. The Florida courts' reliance on *Baldwin* is therefore a *non sequitur*.

II. State courts are divided over the meaning of "discrimination" under the dormant Commerce Clause and Privileges and Immunities Clause

This Court's intervention is needed to clarify accumulating confusion among state courts over the correct interpretation of this Court's decisions that the Constitution creates a national market free of restrictive trade practices and discriminatory taxation by one state against the citizens of another state. Those decisions are derived from two distinct but related constitutional provisions: the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV.

In the decision below, and in a number of challenges to similar taxation schemes elsewhere favoring resident property owners, state courts have found that selectively capping property tax assessments only for permanent residences does not unconstitutionally "discriminate" under the anti-discrimination decisions of this Court. *Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc.*, 579 S.E.2d 200, 205 (Ga. 2003). Other state courts have similarly found that exempting a fixed portion of the value of a homestead property is not discrimination. *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 269 (Alaska 2003); *Citizens for Uniform Taxation v. Northport Public Sch. Dist.*, 608 N.W.2d 480, 483 (Mich. App. 2000); *Markham v. Comstock*, 708 N.Y.S.2d 674, 675 (N.Y. App. Div. 2000); *Reinish*, 765 So. 2d at 208.

These opinions have all relied on the logic presented by the New Jersey Supreme Court in one of the earliest challenges, *Rubin v. Glaser*, 416 A.2d 382 (N.J. 1980), to such assessment limitation and exemption laws. *Citizens*, 608 N.W.2d at 483; *Markham*, 708 N.Y.S.2d at 675; *Reinish*, 765 So. 2d at 205-06; *see Stanek*, 81 P.3d at 271-72 (relying on *Citizens*, *Markham*, and *Reinish*). The *Rubin* Court argued that a state's decision to reserve some property-tax benefits only for a permanent residence does not discriminate against non-residents, because it disadvantages not only non-residents, but also those New Jerseyans who own a second home in the state. 416 A.2d at 386-87. Since some New Jerseyans, too, were affected by the law, the Court asserted, the tax scheme discriminated, if at all, only on the basis of the use of the property as a second home, not the citizenship of its owner. *Id.*

In contrast, other state appellate courts have held that the discrimination of a state law against some residents does not justify its discrimination against non-residents. For example, New York's highest court struck down an Albany municipal ordinance imposing a higher tax on "transient" retailers than on retailers operating from a fixed place with the city. *Homier Distrib. Co., Inc. v. City of Albany*, 681 N.E.2d 390, 391-92 (N.Y. 1997). The court explicitly rejected the city's argument that its tax burdened both New York businesses and interstate businesses alike, holding that "the discriminatory character of the law is not altered because its burden may also fall upon some local businesses." *Id.* at 394.[7]

Likewise, the Kansas Supreme Court struck down a Kansas tax scheme favoring intracounty natural-gas transport businesses over similar businesses whose enterprises crossed into other counties or states. *In re CIG Field Servs. Co.*, 112 P.3d 138, 141 (Kan. 2005). The Court there expressly rejected the argument, advanced by Kansas, that its tax scheme did not discriminate against interstate commerce *per se* because it also disadvantaged some businesses wholly within Kansas. *Id.* at 149-51.

A number of other state appellate courts have also directly rejected the claim that discrimination against some in-state residents shields a law from constitutional scrutiny. *Op. of the Justices to the House of Representatives*, 702 N.E.2d 8, 13 (Mass. 1998) (opining that differential tax on auto rentals imposing lower rate on city residents discriminates against interstate commerce); *Sanifill, Inc. v. Kandiyohi County*, 559 N.W.2d 111, 115 & n.3 (Minn. App. 1997) (striking down sanitation fee scheme that adversely affected both in-state and out-of-state competitors).

---

[7] As a measure of the extent of the state-court confusion on this point, we note that *Homier* was not cited by the intermediate appellate court in *Markham*, the New York property tax case.

New York and Kansas are correct, and New Jersey and the Florida courts below are mistaken. This Court has long held that a state tax working to the disadvantage of interstate commerce constitutes impermissible discrimination, irrespective of whether the tax might also affect some in-state actors. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951) (citing *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)).

More recently, this Court has suggested that fiscal schemes that disadvantage both interstate as well as some intrastate actors might be sustained where "the existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." *West Lynn Creamery, Inc.*, 512 U.S. at 200 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)). That factor, though, cannot save an otherwise unconstitutional tax scheme where the in-state interests affected have been mollified by being granted another benefit, or where the in-state interests are so diffuse that they cannot be expected effectively to oppose the challenged enactment.

As demonstrated in Section I.A. hereof, there is no plausible in-state constituency that would oppose SOHA. Although SOHA does impose higher taxes both on second-home owners who primarily reside in Florida and also on those who reside elsewhere, the Floridians receive a rebate of their higher taxes through lower taxes on their homestead residences because of the subsidy to the Florida Education

Finance Program provided by the higher taxes paid by non-residents. The net result is, as in *West Lynn Creamery*, that only non-Floridians bear the full burden of SOHA's differential treatment.

To the extent that these political considerations would be determinative, this petition presents a uniquely clear application of them in the property-tax context, and distinguishes this case from cases challenging a simple property tax exemption. SOHA shifts Florida's tax burden away from Florida voters and onto nonresidents to a degree that is orders of magnitude greater than the property tax law of any other state. Only seven states both grant an assessment cap and also limit that cap to permanent residences. Mark Haveman & Terri A. Sexton, Lincoln Institute of Land Policy, *Property Tax Assessment Limits: Lessons From Thirty Years of Experience* 11 (2008). Of these statutes, the next largest in effect after Florida is Texas; studies estimate that Texas' statute has resulted in $10 to $15 billion in untaxed property value. *Id.* at 16. In contrast, estimates are that SOHA has resulted in about *$400 billion* in untaxed value. *Id.*

Finally, it should be recognized that a conflict between state courts is the only division of authority that is likely ever to develop on this issue, because the lower federal courts lack jurisdiction to consider Petitioners' claims and others like them. The Tax Injunction Act, 28 U.S.C. § 1341, likely prohibits Petitioners, who are seeking to limit the amount of tax owed to the State of Florida, from obtaining injunctive relief in federal court. *Hibbs v. Winn*, 542 U.S. 88, 106 (2004) (explaining that TIA bars federal suit by "plaintiffs who mount[] federal litigation to avoid paying state taxes" where state procedures are adequate to provide a hearing for taxpayers). Further, under the doctrine of comity, a lower federal court cannot award damages "in state tax cases," at least in instances in which the available state remedies are "plain, adequate, and complete." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107, 116 (1981). The possibility that Petitioners' claims could be resolved by increasing another's tax, rather than decreasing their own, does not lift these bars. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335-36 (2010).

Accordingly, this Court should grant the instant petition in order to clarify that, with respect to a tax scheme as extreme as that of Florida, an apparent disadvantage to some in-state interests does not mitigate actual discrimination against interstate commerce.

III. The Petitioners' dormant Commerce Clause claims should not have been dismissed by the Florida courts below without undertaking the fact-intensive balancing test required by *Pike v. Bruce Church, Inc.*, and *Kentucky Dep't of Revenue v. Davis*.

Even if this Court determines not to strike down the SOHA 3% assessment cap as plainly violative of the Constitution for reasons set forth above, Petitioners are entitled to a remand for a trial in which their claims under the dormant Commerce Clause will be subjected to a fact-intensive balancing test of the local benefit of SOHA against its burden on interstate commerce. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court stated that:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (internal citation omitted). Most recently, this Court, in *Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328 (2008), stated that, " . . . we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Id.* at 353.

The Florida First District Court of Appeal ("DCA") affirmed the trial court's dismissal of all of Petitioners' claims pursuant to a motion to dismiss for failure to state a claim upon which relief could be granted and refused to remand this cause to the trial court for a *Pike* analysis. The DCA opinion relied in great part on its prior decision in *Reinish*, *supra,* and in that opinion the DCA acknowledged that *Reinish* pertained *only* to the basic $25,000 exemption provided by SOHA, and not to the assessment cap. (App. 6). However, in the *Reinish* opinion, the DCA specifically referenced the requirement of a *Pike* analysis and applied it to the facts of that case. *Reinish*, 765 So. 2d at 215. In other words, the DCA subjected the homestead exemption to a *Pike* analysis, but refused to do so for the SOHA assessment cap. This far exceeds merely being inconsistent or illogical. The Florida courts below have denied Petitioners the opportunity to be heard in this case where the presentation and consideration of evidence would appear to be guaranteed by *Pike*. Therefore, Petitioners at a minimum respectfully request that this cause be remanded for further proceedings consistent with *Pike*.

IV. F.S.A. § 194.171 cannot bar retroactive relief.

For no discernible reason, without any supporting analysis, and in contravention of due process protections mandated by decisions of this Court, the DCA held: "If this court were to find the provision and statutes unconstitutional, this would not entitle the plaintiffs to a reduction or a refund." *Lanning*, 16 So. 3d at 297. In other words, a successful challenge to an unlawful tax would result merely in not having to pay the unlawful tax in the future. Merely not having to pay the tax in the future is not a sufficient post-deprivation remedy under the constitutional jurisprudence of this Court:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993).

Notwithstanding that mandate of retroactive relief, however, the DCA held that a trial court lacks jurisdiction in the face of F.S.A. § 194.171 to consider any form of supplemental relief incident to a declaratory judgment. Such a holding is plainly incorrect. That statute does not trump the due process rights taxpayer enunciated in *McKesson Corp. v. Florida Alcohol and Tobacco Div.*, 496 U.S. 18 (1990), and cannot bar Petitioners from asserting a right to a refund or other meaningful post-deprivation relief after being required to pay an invalid tax.

◆

CONCLUSION

In view of the massively discriminatory effect of Florida's Save Our Homes Amendment upon interstate commerce and the inequalities in national citizenship resulting therefrom, Petitioners request that this Court issue its writ of certiorari to the Florida First District Court of Appeals.

Respectfully submitted,

WILLIAM M. SLAUGHTER
Counsel of Record
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
2001 Park Place, Suite 1400
Birmingham, AL 35203
Tel: 205-251-1000
wms@hsy.com

MARK D. HESS
HASKELL SLAUGHTER YOUNG
& REDIKER, LLC
2001 Park Place, Suite 1400
Birmingham, AL 35203

DOUGLAS S. LYONS
LYONS & FARRAR
325 N. Calhoun Street
Tallahassee, FL 32301

SUSAN L. KELSEY
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301

August 24, 2010

Attorneys for Petitioners

APPENDIX A – OPINION OF THE FLORIDA FIRST DISTRICT COURT OF APPEAL FILED AUGUST 26, 2009

16 So.3d 294

District Court of Appeal of Florida,
First District.

Jerome K. LANNING and Joyce A. Lanning,
husband and wife, and Ann C. Reese, as personal
representative of the estate of Marlow Reese,
individually and as representatives of
similarly situated persons, Appellants,

v.

Patrick P. PILCHER, individually and in his official
capacity as Property Appraiser of Walton County,
Florida; Rhonda Skipper, individually and in
her official capacity as Tax Collector of Walton
County, Florida; Walton County, Florida, a political
subdivision of the State of Florida; the Walton County
School Board; Timothy Smith, individually and in his
official capacity as Property Appraiser of Okaloosa
County, Florida; Chris Hughes, individually and in
his official capacity as Tax Collector for Okaloosa
County, Florida, Okaloosa County, Florida, a political
subdivision of the State of Florida; the City of Destin,
Florida, a municipal corporation; the Okaloosa
County School Board, James Zingale, individually
and in his capacity as Executive Director of the
Department of Revenue; and all named Defendants,
individually and as representatives of a class of
similarly situated persons or entities, Appellees.

No. 1D07-6564.

Aug. 26, 2009.

Appendix A

William Slaughter, Matthew T. Franklin, Mark D. Hess and James Wallace Porter of Haskell, Slaughter, Young & Rediker, LLC, Birmingham, AL; Thomas T. Gallion, III, of Haskell, Slaughter, Young & Gallion, LLC, Montgomery, AL; James G. Feiber, Jr. of Salter, Feiber, Murphy, Hutson & Menet, P.A., Gainesville; Marsha L. Lyons and Douglas S. Lyons of Lyons & Farrar, P.A., Tallahassee; William C. Owen of William C. Owen, LLC, Tallahassee; Talbot D'Alemberte of D'Alemberte & Palmer, PLLC, Tallahassee, for Appellants.

Bill McCollum, Attorney General, Scott D. Makar, Solicitor General, Charles B. Upton, II, Deputy Solicitor General, Jarrell L. Murchison, Assistant Attorney General and James Clifton Cox, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Appellees James Zingale and the Department of Revenue; John C. Dent, Jr., and R. Laine Wilson of Dent & Johnson, Chartered, Sarasota, for Appellees Timothy Smith and Chris Hughes; Gregory Stewart, Harry Chiles and Carly J. Schrader of Nabors, Giblin & Nicherson, P.A., Tallahassee, for Appellees Okaloosa County and Walton County School Board; Joseph C. Mellichamp, III, and Larry E. Levy of The Levy Law Firm, Tallahassee, for Appellees Patrick Pilcher and Rhonda Skipper; C. Jeffery McInnis of Anchors Smith Grimsley, Ft. Walton Beach, for Appellee Okaloosa County School Board; Michael S. Burke, Office of County Attorney, Defuniak Springs, for Appellee Walton County; John

R. Dowd, Okaloosa County Attorney, Shalimar, for Appellee Okaloosa County; Ben L. Holley, Crestview, for Appellee Walton County School Board.

PADOVANO, J.

This is an appeal from a final order upholding the constitutional validity of article VII, section 4(c) of the Florida Constitution, commonly known as the "Save Our Homes" Amendment.[1] The plaintiffs argue that section 4(c) violates their rights under various provisions of the United States Constitution, principally the Equal Protection Clause, the Privileges and Immunities Clause, and the Commerce Clause. The defendants argue in their answer brief that the trial court decided the case correctly on the merits. Some of them have also filed a cross-appeal to present an alternative claim that the trial court lacked jurisdiction to consider the plaintiffs' challenge. The argument on the cross-appeal is that the plaintiffs were required by law to assert their claim within sixty days of the date of their property assessments. We affirm the order on the appeal and the cross-appeal and offer very little comment, as all of the issues in this case are controlled by well reasoned precedent.

---

[1] Article VII, section 4(c) of the Florida Constitution provides that annual changes in the tax assessments on homestead property

> . . . shall not exceed the lower of the following:
>
> a. Three percent (3%) of the assessment for the prior year,
>
> b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967 = 100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

We consider first the issue presented in the cross-appeal. The defendants contend that the trial court should have dismissed the case for lack of jurisdiction, because section 194.171, Florida Statutes, requires that an action such as this be filed within sixty days of the tax assessment. This argument was considered and rejected by the court in *Reinish v. Clark,* 765 So.2d 197 (Fla. 1st DCA 2000). There we held that the sixty-day time period in section 194.171 applies only to an action to contest a property tax assessment or the denial of an exemption and that it does not apply to litigation such as this involving the validity of the tax laws. *See Reinish,* 765 So.2d at 202.

Our decision in *Reinish* is supported by the plain meaning of the statute, and we see no reason to recede from it now. Section 194.171, Florida Statutes states in material part:

> **194.171 Circuit court to have original jurisdiction in tax cases.** –
>
> (1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. . . .
>
> (2) No action shall be brought to contest a tax assessment after 60 days from the

> date the assessment being contested is certified for collection. . . .

The statute begins by creating a broad grant of jurisdiction in "all matters relating to property taxation," and then it goes on to create a filing period for certain kinds of actions: those in which the landowner is contesting a tax assessment. The defendants construe the limitation for challenging an assessment as if it applies to all litigation relating to property taxation, but that is not what the statute says.

The plaintiffs are not contesting the tax assessments on their property. Rather, they are challenging a provision of the Florida Constitution and the statutes enacted to implement that provision.[2] If this court were to find the provision and statutes unconstitutional, this would not entitle the plaintiffs to a reduction or a refund. The point of the case is that the Florida property tax scheme has a discriminatory effect on nonresidents. The case has nothing to do with the assessment made on any particular property in Florida, and so the sixty-day provision in section 194.171 and the policy considerations underlying the statute do not come into play.

---

[2] Compare *Markham v. Neptune Hollywood Beach Club,* 527 So.2d 814 (Fla.1988), a case in which the plaintiffs raised a constitutional challenge to their ad valorem tax assessments on condominiums and to the authorizing statute. The supreme court held that the trial court had properly dismissed the case for failure to file within sixty days under section 194.171(2).

Appendix A

The main appeal consists of a series of federal constitutional challenges to article VII, section 4(c), but all of the supporting arguments have been rejected before in comparable cases. For example, the Supreme Court held in *Nordlinger v. Hahn,* 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), that a California constitutional amendment limiting real property tax increases to 2% per year, in the absence of a change of ownership, did not violate the Equal Protection Clause. And this court held in *Reinish* that the Florida homestead exemption did not violate the Equal Protection Clause, the Privileges and Immunities Clause, or the Commerce Clause. Although *Reinish* dealt with the application of the $25,000 homestead exemption, while this case involves a challenge to the 3% tax cap on increases in the assessment of homestead property, the analysis is the same. In both cases, the tax benefit is based on the way the property is used, not on the status of the landowner as a resident or nonresident.

The homestead exemption and the 3% tax cap apply only to property that is used as a primary residence and therefore qualifies as a homestead. A Florida resident who owns vacation property or business property in the state will not be entitled to claim any tax benefit under article VII, section 4(c) and will be in the same position with respect to that property as a nonresident. The plaintiffs argue that the existence of a benefit for homestead property, when combined with the tax treatment of non-homestead property, gives Florida residents a tax advantage, but this is essentially an argument that the homestead exemption is itself unconstitutional, a point rejected in *Reinish*.

For these reasons we hold that article VII, section 4(c) of the Florida Constitution is valid under the United States Constitution and that it does not violate a nonresident's rights under the Equal Protection Clause, the Privileges and Immunities Clause, or the Commerce Clause. Likewise, we hold that section 193.155, Florida Statutes, the law implementing article VII, section 4(c), is constitutionally valid.

Affirmed.

BARFIELD and LEWIS JJ., concur

Appendix B

APPENDIX B – ORDER OF THE LEON COUNTY CIRCUIT COURT DISMISSING ACTION FILED OCTOBER 18, 2007

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL
CIRCUIT, IN AND FOR LEON
COUNTY, FLORIDA

CASE NO: **37-2007-CA-000582**
Class Action

JEROME K. LANNING and JOYCE A. LANNING, husband and wife, and **MARLOW REESE,** individually and as representatives of similarly situated persons,

Plaintiffs,

vs.

PATRICK P. PILCHER, individually and in his official capacity as Property Appraiser of Walton County, Florida; **RHONDA SKIPPER,** individually and in her official capacity as Tax Collector of Walton County, Florida; WALTON **COUNTY, FLORIDA,** a political subdivision of the State of Florida; the **WALTON COUNTY SCHOOL BOARD;** et al.,

Defendants.

Appendix B

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

THIS CAUSE came before the Court for hearing on August 6, 2007, after proper notice, on the various motions to dismiss filed by the defendants pursuant to Florida Rule of Civil Procedure 1.140(b), and the defendants' motion to strike certain exhibits attached to the plaintiffs' Second Amended Complaint. Plaintiffs had voluntarily filed a First Amended and Restated Complaint before the defendants responded to the initial Complaint, and subsequently requested leave to file a Second Amended Complaint. After hearing on July 19, 2007, the plaintiffs' motion for leave to file a Second Amended Complaint was granted.

The defendants previously had filed motions to dismiss addressed to the plaintiffs' First Amended and Restated Complaint and it was agreed by the parties and approved by this Court that the defendants' motions to dismiss previously filed could be considered as addressing the Second Amended Complaint, that the defendants could file supplemental motions addressing the Second Amended Complaint, and that the plaintiffs could file their written responses to the defendants' motions and the arguments contained therein within the time fixed by the Court.

The parties furnished extensive motions and authorities, and the Court carefully reviewed the same prior to the hearing. Having heard the argument of counsel and considered the motions and the authorities cited therein, and being otherwise duly advised in the premises, this Court hereby declares its findings and conclusions as hereinafter set forth. Initially, the Court determines that this case relates solely to the Save Our Homes Amendment (SOHA) and any enabling statutes uniquely related to that amendment. This ruling is not intended to have any effect on what has been referred to in some of the memos as House Bill 1B or any legislation passed by the 2007 Legislature relating to ad valorem taxes or any proposed constitutional amendment relating to ad valorem taxes. The Court's purpose in setting forth the scope of this ruling is to make certain that no ruling of this Court would inadvertently be deemed to be a ruling on another case that's pending before a different judge.

Facts

Plaintiffs' Second Amended Complaint challenges the validity of Article VII, Section 4(c), Florida Constitution, the provision commonly referred to as the "Save Our Homes Amendment" (SOHA), adopted by the people of the State of Florida in 1992, and section 193.155, Florida Statutes (2006), its implementing statute, on the basis that they violate provisions of the U. S. Constitution. Plaintiffs contend that the SOHA violates the Privileges and Immunities Clause of Article IV, Section 2 of the U.S. Constitution; the

Due Process and Equal Protection Clauses of the 14th Amendment of the U. S. Constitution; the Right to Travel; and the Dormant Interstate Commerce Clause set forth in Article I, Section 8 of the U.S. Constitution.

Plaintiffs contend that a federal deprivation occurs under the SOHA and, hence, they bear a disproportionate share of the ad valorem tax burden because they are permanent residents of Alabama and are not entitled to receive the benefits of homestead tax exemption and the attendant benefit of the SOHA that residential homestead property owners receive under Florida law. The plaintiffs, pursuant to chapter 86, Florida Statutes (2006), and 42 U.S.C. § 1983, seek a declaratory judgment, prospective relief, and supplemental retroactive relief by way of a refund of the alleged excess taxes paid for the preceding four years, together with attorneys' fees under 42 U.S.C. § 1988.

Plaintiffs seek class action status and relief. Their Second Amended Complaint consists of six counts and the contentions of each will be addressed herein, together with the issues raised by the defendants' motions.

Subject Matter Jurisdiction

By motions to dismiss, defendants contend that this Court lacks subject matter jurisdiction for the reasons that the plaintiffs' suit was not filed within the 60-day time period of non-claim provided for in section 194.171, Florida Statutes (2006). Plaintiffs' suit seeks both prospective and retroactive relief in the form of refunds for the prior four-year period on the basis of the alleged federal deprivations. The defendants contend that the 60-day time period for filing suit challenging ad valorem tax assessments for any of said years has long since passed, and that suit for relief for any of the said years is barred by the 60-day non-claim statute. In support of this contention defendants cite the Florida Supreme Court's decision in *Ward v. Brown,* 894 So.2d 811 (Fla. 2004) (*Ward II*), which affirmed *Ward v. Brown,* 892 So.2d 1059 (FL. 1st DCA 2003) (*Ward I*), and *Cason v. Dep't of Management Servs.,* 944 So.2d 306 (Fla. 2006). The defendants argue that the broad language in *Ward II,* established that the 60-day non-claim statute operates as a jurisdictional bar to suits involving ad valorem taxes regardless of the basis for the suit. The defendants argue that *Ward II* effectively overruled the First District Court of Appeal's holding in *Reinish v. Clark,* 765 So.2d 193 (Fla. 1st DCA 2000), *review denied,* 790 So.2d 1107 (Fla. 2001), *cert. denied,* 534 U.S. 993 (2001), even though *Reinish* is not mentioned in *Ward.*

The Court finds that the *Cason* and *Ward* decisions do *not* overrule *Reinish,* and they are factually distinguishable as they do not involve a constitutional challenge as does the instant case and as did *Reinish.*

Therefore, I find that *Reinish* applies on the jurisdictional issue and that this Court has jurisdiction to consider this case. Defendants' motions to dismiss for lack of subject matter jurisdiction are denied.

Parties

The plaintiffs name as defendants Patrick Pilcher individually and in his official capacity as Property Appraiser of Walton County (Pilcher), Rhonda Skipper, individually and in her official capacity as Tax Collector of Walton County (Skipper), Timothy Smith individually and in his official capacity as Okaloosa County Property Appraiser (Smith), Chris Hughes individually and in his official capacity as Okaloosa County Tax Collector (Hughes), and James Zingale, individually and in his official capacity as the Executive Director of the Florida Department of Revenue (Zingale). Defendants Pilcher, Skipper and Zingale have moved to dismiss plaintiffs' Second Amended Complaint as to them individually for failure to state a cause of action against them in their individual capacities.

(a) Defendants Pilcher, Skipper, Smith and Hughes individually.

Review of the Second Amended Complaint discloses that the only place Pilcher and Skipper are directly mentioned in their individual capacities is paragraphs 85 and 86, and in both of these paragraphs the allegations are directed to acts and conduct involved in assessing ad valorem taxes (exactions) alleged to be unconstitutional. Nowhere do plaintiffs allege that Pilcher and Skipper individually performed any act or were guilty of any action adversely affecting plaintiffs, or that they acted arbitrarily, abused their discretion, or did anything except perform their respective duties as required by law, including the SOHA and section 193.155. All allegations are addressed to actions taken in their official capacities as property appraiser and tax collector respectfully. Furthermore, no extant judicial authorities are cited or could be cited that have held invalid any part of the SOHA, which said defendants' individually or officially could or should have been aware of which would in any way alter their respective official duties in implementing the assessment and collection of taxes pursuant to the SOHA, and plaintiffs have cited none.

The property appraiser and tax collector are constitutional officers who perform the duties prescribed by the Florida Constitution and statutes. The property appraiser and tax collector have certain specified statutory duties pertaining to the assessment and collection of ad valorem taxes. All allegations of plaintiffs' Second Amended Complaint are addressed to official actions taken pursuant to the Florida Constitution and statutes, and neither Pilcher nor Skipper acting individually have any duty or authority with regard to same. The Court notes that paragraphs 85 and 86 are not re-alleged under Count VI in paragraph 94, but said defendants are individually mentioned in paragraph 95 which is part of plaintiffs' allegations pertaining to HB-1B. Although mentioned individually, Pitcher and Skipper as individuals have no duty or responsibility pursuant to HB-1B. Plaintiffs do not allege that Pilcher and Skipper are required to take any act or perform any duty pursuant to HB-1B, and the only official action mentioned is with regard to implementing HB-1B as part of the budget process, which does not change the assessment and collection process

During argument, counsel for the plaintiffs acknowledged that only official duties were involved in assessing and collecting taxes and in refunding same. All action previously taken in assessing and collecting taxes and complying with SOHA requirements was taken pursuant to law and neither Pilcher nor Skipper are alleged to have not followed the law in this regard. Nor is there any body of law or judicial decision or other recognized lawful authority suggesting that the implementation by Pilcher or Skipper was in any way improper, and administrative officials certainly are entitled to rely on the presumption that Article VII, Section 4(c) and section 193.155 are valid.

Accordingly, plaintiffs' suit against Pilcher and Skipper as individuals fails to state a cause of action and is dismissed as to these individuals with prejudice. Although no similar motion was filed on behalf of the defendants Smith and Hughes, the plaintiffs'

Second Amended Complaint is also dismissed as to them individually for the reasons stated.

(b) Defendants Walton County, Walton County School Board, Okaloosa County, Okaloosa County School Board and City of Destin.

Defendants Walton County, Florida, the Walton County School Board, Okaloosa County, the Okaloosa County School Board, and the City of Destin have all moved to be dismissed as parties because they assert they have no duty to assess or collect taxes under Florida law and, accordingly, plaintiffs' Second Amended Complaint fails to state a cause of action as to these defendants. They contend that under Florida law, local budget entities such as these five named entities have no authority to assess or collect ad valorem taxes, or to refund same if found unlawful. They contend that valorem taxes are collected by the tax collector based on the tax rolls prepared by the property appraiser in each county. They contend that these entities are local budget entities that, as part of their budgeting process, fix millage rates, which are then extended by the property appraisers on the tax rolls as prepared by property appraisers and preparation of tax rolls reflecting ad valorem tax exemptions and taxable value is solely a property appraiser duty. *See* Ch. 200, Fla. Stat. (2006); §§ 192.122, 192.001(4), (6), (7), (9), 193.116, Fla. Stat. (2006). Finally, they assert that refunds are made by the tax collector pursuant to section 197.182, Florida Statutes (2006), and budget entities have no authority or duty for same.

Inasmuch as the Court has found the SOHA and section 193.155 valid as addressed later herein, the court deems it unnecessary to rule on these defendants' motions and defers same as moot.

(c) Defendant James Zingale.

Defendant James Zingale, Executive Director of the Florida Department of Revenue, is named both individually and as Executive Director of the Florida Department of Revenue in the caption of the Second Amended Complaint, and is identified in paragraph 15 of the plaintiffs' Second Amended Complaint, but is not sued in his individual capacity and is named a party only "with respect to structuring and implementation of any post-deprivation relief which may be awarded to plaintiffs" in his official capacity. However, paragraph 95 of plaintiffs' Second Amended Complaint, is somewhat ambiguous because the plaintiffs group the local defendants/property appraisers and tax collectors with Zingale and refer to all "in both their official and individual capacities." In light of paragraph 15 of the plaintiffs' Second Amended Complaint, the Court does not consider these language choices as embracing Zingale in his individual capacity but to the extent it might be so contemplated the court rules that the plaintiffs' Second Amended Complaint fails to state a cause of action against defendant Zingale individually also and plaintiffs' Second Amended Complaint is hereby dismissed with prejudice as to defendant Zingale individually.

Count I

Count I contains the substantive allegations of the Second Amended Complaint alleging that the SOHA and the implementing statute, section 193.155, are unconstitutional in violation of various provisions of the U. S. Constitution. For the reasons hereinafter set forth, this Court considers these allegations as controlled by the decision of the U. S. Supreme Court in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2236 (1992), and *Reinish*. Each of the constitutional deprivations alleged were addressed in *Reinish*, and *Nordlinger* addressed an ad valorem taxing procedure for assessing property in California similar to that used in Florida, pursuant to Article VII, Section 4(c), Florida Constitution.

Commerce Clause

(Article I, Section 8, U.S. Constitution)

Plaintiffs assert that the SOHA and the statute violate the Commerce Clause, and more specifically what is referred to as the Dormant Commerce Clause. Plaintiffs contend that the SOHA "casts a pall over a national market, namely the national housing market" among other things and that this violates the

Dormant Commerce Clause for the benefit of the residents to the disadvantage of non-residents. (Second Amended Complaint at ¶ 51) The defendants respond that this issue was decided adversely to the plaintiffs' contention in *Reinish* and, moreover, that the SOHA applies even-handedly to both resident and non-resident, non-homestead property owners the same, focusing on the use of the residential property.

The Court finds that the rationale of *Reinish* and *Nordlinger* is sound and those decisions are controlling. Although *Reinish* involved a direct facial attack on the $25,000 homestead exemption found in Article VII, Section 6, Florida Constitution, the Court considered the impact of the SOHA and section 193.155 in its analysis. *See Reinish*, 765 So.2d at 213. The SOHA provisions do not treat local persons and non-local persons who are similarly situated differently, and the SOHA is not facially unconstitutional as plaintiffs allege under the Dormant Commerce Clause. Owners of vacation or second residential properties are all treated the same for ad valorem tax purposes whether they have a homestead in Florida or Alabama, or no homestead at all, or live primarily on a boat. It is the use of the property that determines its taxable status, and thus, in turn, determines the method of valuation for ad valorem assessment purposes that determines the amount of ad valorem taxes levied against such property. At bar, it is admitted by the plaintiffs that none of them are entitled to receive homestead exemption under Florida law. Each plaintiff is a permanent resident of the State of Alabama.

The Court also concludes, as was held in *Reinish*, that the SOHA is an even-handed regulation that promotes the legitimate strong public interest in promoting the establishment and continuity of the primary and permanent home. The Court adopts the reasoning and finding stated in *Reinish* on this point. *Nordlinger* expressed a similar rationale. Accordingly, the allegations in Count I of plaintiffs' Second Amended Complaint of violations of the Commerce Clause, and more specifically what is referred to as the Dormant Commerce Clause are hereby dismissed with prejudice.

Privileges and Immunities – Right to Travel

(Article IV, Section 2, U.S. Constitution)

Plaintiffs contend that Article IV, Section 2, U.S. Constitution, is violated. Plaintiffs allege that the SOHA places out-of-state persons owning vacation homes in Florida on a "different footing" from Florida citizens in terms of residential property ownership. No privileges and immunities violation exists. Here, it is the use of the residential property which controls its taxable status, not the owner or place of residence of the owner. All vacation, summer or second homes are assessed and taxed in the same manner and an owner's place of permanent residence is immaterial.

Both *Reinish* and *Nordlinger* rejected similar contentions.

No deprivation of the constitutional right to travel exists. As part of the plaintiffs' Privileges and Immunities contention, the plaintiffs contend that the right to travel between states, which all U.S. citizens have, is restricted. Both *Reinish* and *Nordlinger* rejected a similar contention. *Reinish* points out that no meaningful limitation on travel is shown there and none is shown here. Here, plaintiffs suggest that the SOHA resulting different tax treatment of vacation residential property and homestead residential property restricts or discourages travel of all citizens between states. What others may feel about traveling to Florida is not a matter of consideration, as *Nordlinger* noted, stating:

> At the outset, petitioner suggests that Article XIIIA qualifies for heightened scrutiny because it infringes upon the constitutional right to travel. See *e.g., Zoebel v. Williams*, 457 U.S. 55, 60, N.6, 102 S.Ct. 2309, 2312, n. 6, 72 L.Ed.2d 672 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-256, 94 S.Ct. 1076, 1080-1081, 39 L.Ed.2d 306 (1974). In particular, petitioner alleges that the exemptions to reassessment for transfers by owners over the age of 55 and for transfers between parents and children run afoul of the right to travel, because they classify directly on the basis of California residency. But the complaint does

> not allege that petitioner herself has been impeded from traveling or from settling in California because, as has been noted, prior to purchasing her home, petitioner lived in an apartment in Los Angeles. This Court's prudential standing principles impose a 'general prohibition' on a litigant's raising another person's legal rights. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 92 S.Ct. 1965, 1968, 32 L.Ed.2d 627 (1972). Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf, nor has she shown any special relationship with those whose rights she seeks to assert, such that we might overlook this prudential limitation. *Caplin v. Drysdale, Chartered v. United States*, 491 U.S. 617, 623, n. 3, 109 S.Ct. 2646, 2651, n. 3, 105 L.Ed.2d 528 (1989). Accordingly, petitioner may not assert the constitutional right to travel as a basis for heightened review.

505 U.S. at 10-11. Here, plaintiffs have not identified any obstacle preventing any of them from traveling to or from Florida, or any impediment to travel at all. The bare assertions that others will be "disincentivized from traveling to Florida and purchasing a home" because of the financial implications of the SOHA is insufficient. Plaintiffs are free to enter and leave Florida without restriction and are free to purchase or not purchase property in Florida as desired and

sell same on such terms as the market allows. Plaintiffs cannot litigate the right of others as *Nordlinger* noted citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315 (1984), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).

Nordlinger involved a challenge to California's constitutional amendment referred to as Proposition 13, on the grounds that it violated the 14th Amendment, the Equal Protection Clause, and the federally-protected right to travel. The petitioner asserted that the alleged restriction on the fundamental right to travel placed the burden on the state to show its compelling interest justifying the law, instead of applying the rational basis standard typically employed under the equal protection clause. In *Reinish*, the plaintiffs also alleged a violation of the Equal Protection Clause. *Reinish* and *Nordlinger* both rejected this contention stating that reasonable classifications were permitted under the Equal Protection Clause and the appropriate standard for judicial review is whether the classification treats those so classified the same and reasonably promotes a legitimate state purpose. States have considerable leeway to legislate reasonable classification and to define limits therein. The First District Court of Appeal in *Reinish* citing *Nordlinger* stated:

> As the Florida homestead tax exemption scheme imposes no meaningful restriction upon the Reinishes' fundamental right to travel or upon any other fundamental right,

> the burden does not fall upon the State to show its compelling interest justifying the law. The Court's equal protection jurisprudence clearly indicates:
>
> > [U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
>
> *Nordlinger*, 505 U.S. at 10, 112 S.Ct. 2326;. . . .

765 So.2d at 204.

This Court finds that *Reinish* and *Nordlinger* are controlling and both of the plaintiffs' contentions are rejected. Accordingly, the allegations in Count I of plaintiffs' Second Amended Complaint of violations of plaintiffs' right to travel under the Privileges and Immunities Clause of the U.S. Constitution are hereby dismissed with prejudice.

Equal Protection Clause

As the Court previously stated in the Commerce Clause analysis, plaintiffs, as non-residents owning residential property in Florida, are treated the same as Florida residents owning non-homestead residential property in Florida. Like properties used for the same purpose are treated the same. Vacation or summer residences not receiving homestead status are all assessed the same. *Reinish* and *Nordlinger* control and no cause of action exists under Florida or federal law as to this contention.

Nordlinger addressed the rational basis test and plaintiffs' contentions as follows:

> We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying petitioner the benefits of her neighbors' lower assessments. First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, 'mom-and-pop' businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIIIA assessment scheme rationally furthers this interest.

Nordlinger, 505 U.S. at 12. Continuing the Court stated:

> Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to 'lock in' to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.

Nordlinger, 505 U.S. at 12-13. The comments and reasoning are equally applicable in Florida where increasing property values have been the norm in recent years, particularly the most recent 2-3 years.

The Court adopts the findings of *Reinish* and *Nordlinger*, as to these contentions.

Accordingly, plaintiffs' alleged violations of the Equal Protection Clause in Count I are dismissed with prejudice.

Due Process

Plaintiffs cite no authority for their contention as to due process violations and only generally state that no opportunity to be heard exists. They apparently contend that both procedural and substantive due process violations exist and result from the SOHA. Procedural due process in Florida is ample. Florida provides a plain, speedy and adequate remedy under Florida law by providing both a pre-deprivation remedy and post-deprivation relief.

An aggrieved taxpayer can file suit challenging his/her taxes and pay only those taxes he/she admits in good faith to be due and owing, or pay all taxes assessed and seek refund of the amount the court determines proper. *See* §§ 194.171(3) and (4), Fla. Stat. (2006). Payment of the good faith amount and timely filing suit automatically suspends all collection procedures, which is tantamount to an automatic injunction. Relief also is available under section 197.182, Florida Statutes (2006). No procedural due process violation is shown. Florida provides ample opportunity for hearing and right to be heard with no risk of property loss through forfeiture while the matter is being litigated.

As to substantive due process contentions, Florida is *not* attempting to tax beyond its borders or to treat residents and non-residents differently, or to reach non-Florida property. Real property does not move and it is only the Florida property that is being assessed in Florida without regard to the ownership. It is taxed the same without regard to ownership. This is not a situation such as one sometimes involved in excise taxes (sales tax) cases requiring an inquiry into the contacts within the state by the out-of-state person or entity to reach transactions of tangible goods in transit passing into or through Florida, whereby the court must determine if a sufficient nexus or minimal contacts exist within the taxing jurisdiction to support excise tax imposition and make the out-of-state vendor amenable to being treated as a dealer for sales and use tax collection and reporting purposes. The property is always in Florida, and as such receives the benefit of Florida's police power protections and other governmental infrastructure services provided or made available. Because the real property is not moveable and always is in Florida, the situation is unlike that when a state is attempting to tax tangible personal property, such as railroad rolling stock which is used in transporting goods in multiple states, lacking a clear permanent situs in any one state where some apportionment method may be employed to avoid over-assessing.

Florida's ad valorem tax on all real property is coexistent with the state's boundaries and no extraterritorial action exists. No substantive due process basis exists. Plaintiffs' Second Amended Complaint is dismissed with prejudice as to the due process violation allegations.

42 U.S.C. § 1983 Claim

(Counts II and IV)

Plaintiffs' Second Amended Complaint in Count II re-alleges all allegations contained in paragraphs 1 thru 55 and paragraphs 56 thru 83 of Count I. In Count IV, plaintiffs re-allege all allegations contained in paragraphs 1 thru 55 and paragraphs 56-83 and paragraphs 88 thru 89 of Count II, for the relief sought therein respectively.

All defendants have moved to dismiss the Second Amended Complaint as to all allegations seeking relief pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Defendants contend that this Court lacks subject matter jurisdiction of the plaintiffs' claim based under § 1983. For the reasons hereinafter stated, this Court agrees and the defendants' motions to dismiss Counts II and IV for lack of subject matter jurisdiction are granted.

In *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S.Ct. 2351 (1995), the United States Supreme Court held in a suit contesting a state tax, a Second Amended

Complaint based on relief under 42 U.S.C. § 1983 brought in state court could not be maintained under 42 U.S.C. § 1983 when state law provides a clear and certain remedy.

In addressing the question presented in *National Truck,* the Court stated:

> In determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret *§ 1983* in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that *§ 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists.* Petitioners do not dispute that Oklahoma has offered an adequate remedy in the form of refunds. Under these circumstances, the Oklahoma courts' denial of relief under *§ 1983* was consistent with the long line of precedent underscoring the federal reluctance to interfere with state taxation.

515 U.S. at 589 (emphasis added, italics in original). Thereafter, the Court addressed 28 U.S.C. § 1341, the Tax Injunction Act, stating:

> To be sure the Tax Injunction Act reflects the congressional concern with *federal* court interference with state taxation, see *28 U.S.C. § 1341,* and there is no similar *statute divesting state courts of the authority to enter*

> *an injunction under federal law when an adequate legal remedy, exists.* But this silence is *irrelevant here,* because we do not understand *§ 1983* to call for courts (whether federal or state) to enjoin the tax collection of state taxes when an *adequate remedy is available under state law. Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood* as but a partial codification of the federal reluctance to interfere with state taxation. See *Fair Assessment, supra,* at 110 ('The principle of comity which predated the Act [*§ 1341*] was not restricted by its passage'). After all, an injunction issued by a state court pursuant to *§ 1983* is just as disruptive as one entered by a federal court.

National Truck, 515 U.S. at 590-591 (emphasis added, italics in original).

National Truck also disposes of the plaintiffs' claim for declaratory relief and attorneys' fees under 42 U.S.C. §§ 1983 and 1988 stating:

> *The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well.* In Great Lakes, we observed that 'considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes . . . require a *like restraint in the use of the declaratory judgment procedure.' 319 U.S., at 299.* The declaratory judgment procedure 'may in every practical

> sense operate to suspend collection of the state taxes until the litigation is ended,' *ibid.*, and thus must be treated as being no less potentially disruptive than an injunction. See also *Grace Brethren Church, 457 U.S., at 408* ('[T]here is little practical difference between injunctive and declaratory relief'). Cf. Samuels *v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S. Ct. 764 (1971)* (holding that prohibition against enjoining pending state criminal proceedings applies to granting of declaratory relief). Declaratory relief in state tax cases might throw tax administration 'into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law.' *Perez v. Ledesma, 401 U.S. 82, 128, n. 17, 27 L.Ed.2d 701, 91 S. Ct. 674 (1971)* (Brennan, J., concurring in part and dissenting in part). *We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.*

National Truck, 515 U.S. at 591 (emphasis added, italics in original).

When no relief can be awarded pursuant to 42 U.S.C. § 1983, no attorneys' fees can be awarded under 42 U.S.C. § 1988. *National Truck,* 515 U.S. at 591. That an adequate clear and certain legal remedy exists under Florida law cannot be seriously disputed. Under Florida law, a property owner challenging an ad valorem property tax has several options that encompass both pre-deprivation and post-deprivation relief. *See* § 194.171, Fla. Stat. (2006). The property owner may file suit in circuit court and pay only those taxes that he/she admits in good faith to be due and owing. Such action automatically suspends all proceedings for the collection of taxes prior to final disposition of the action. *See* § 194.171(3), Fla. Stat. (2006). This is in effect an automatic injunction against collection procedures. The statute does not preclude a taxpayer from paying all taxes claimed to be due and seeking relief by way of a refund, since the statute provides that payment shall not be deemed an admission that the tax was due and does not prejudice the right to bring an action seeking refund. *See* § 194.171(4), Fla. Stat. (2006). Refunds are also provided for in section 197.182, Florida Statutes (2006). This is a broader remedy than necessary under *National Truck, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), and *Harper v. Virginia,* 509 U.S. 96, 113 S.Ct. 2510 (1993). Accordingly, since there is a plain, speedy and efficient remedy under state law, there is no jurisdiction in this Court for relief pursuant to 42 U.S.C. § 1983.

Plaintiffs' allegations against Pilcher, Skipper, Smith and Hughes individually under Counts II and IV, and Zingale under Count IV, are insufficient as a matter of law as previously addressed herein. Additional comments are in order as to the 42 U.S.C. § 1983 allegation since it was not involved in *Reinish.*

Appendix B

Plaintiffs' Second Amended Complaint contains no allegations alleging that any of the four-named defendants individually performed any act in derogation of the plaintiff's alleged federally protected rights. The named defendants would be entitled to qualified immunity from any suit for damages brought under 42 U.S.C. § 1983, but all allegations in plaintiffs' Second Amended Complaint address defendants' actions as public officials in the performance of their respective duties in assessing property, extending and collecting taxes in compliance with Florida law which includes the challenged SOHA and section 193.155, Florida Statutes (2006). The defendants had a duty to comply with said provisions until such time as declared invalid by a court of competent jurisdiction or changed by the people through a constitutional amendment. Plaintiffs' suit clearly is a suit against them officially, not the named individuals, separate and apart from the office. This situation is readily distinguishable from that in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982), and the other cases cited by the plaintiffs, none of which involved state taxes, and all of which involve alleged misuse of power situations, knowing or intentional violations of federal protected rights and similar actions. None of the cases cited by the plaintiffs are analogous to the instant case and plaintiffs' Second Amended Complaint does not allege a cause of action against defendants Pilcher, Skipper, Smith, Hughes or Zingale individually under state law or 42 U.S.C. § 1983, since there is a plain, speedy and complete remedy this Court has no jurisdiction pursuant to 42 U.S.C. § 1983, for a suit challenging taxes in their official capacity. All allegations are directed at duties performed in their official capacities by the defendant property appraiser or tax collectors.

Harlow recognized the distinction between absolute and qualified immunity of state officers, but also recognized that a high degree of judicial scrutiny is necessary in any suit brought pursuant to 42 U.S.C. 1983 alleging civil right deprivation.

In their response to the defendants' motions to dismiss, plaintiffs contend that the defendants are "persons" within 42 U.S.C. § 1983 in their official capacity and that "plaintiffs are permitted to name such defendants in their individuals capacities." (Plaintiffs' Response at pp. 26-27) Plaintiffs articulate their position as follows:

> Plaintiffs contend that such individual Defendants both in their official and individual capacities knew or should have known that the SOHA scheme was unconstitutional, and in the appraisal of real property and the collection of associated taxes under the color of such state law, they deprived Plaintiffs of their constitutional rights as outlined in the Complaint. The United States Supreme Court has stated that state officials may be held liable under Section 1983 based upon actions taken in their individual capacities and that their potential liability is not limited to acts under the color of state law that

> are outside their authority or not essential to operation of state government, but also extends to acts within their authority and necessary to performance of governmental functions.

(Plaintiffs' Response at pp. 27-28)

Plaintiffs cite and quote from *Hafer v. Melo* 502 U.S. 21 (1991). This Court is of the view that plaintiffs' reliance on *Melo, Harlow, Arney v. Dep't of National Resources,* 448 So.2d 1041 (Fla. 1st DCA 1983), *Hambley v. Dep't of Natural Resources,* 459 So.2d 408 (Fla. 1st DCA 1984), and *Will v. Michigan Dep't of State Police,* 491 U.S. 58 (1989) is misplaced. The Court agrees that the named defendants, Pilcher, Skipper, Smith, Hughes and Zingale, all enjoy qualified immunity, but plaintiffs' Second Amended Complaint fails to contain any allegation that any of these defendants acted individually in any manner or performed any act individually to violate any federally-protected right. Plaintiffs do not allege any basis for their "bare statement" that defendants "knew or should have known" that in implementing the SOHA federal rights would be violated. Nor have plaintiffs provided any basis for the statement that "reasonable people would or should have known." (Plaintiffs' Response at p. 28) As to the defendants in their individual capacities, in each of the counts in the case where the defendants are sued individually, The Court finds that qualified immunity does apply to them and grants the motion to dismiss as to qualified immunity as to each of the individually-named defendants. Here, the Second Amended Complaint does not meet the heightened pleading requirement as to individual capacity but, even more importantly, that there is no allegation, and the Court cannot conceive of an allegation, where one could allege the defendants have violated a clearly-established constitutional right. In light of the review of the case law and the arguments heard, there has been no case cited indicating that the SOHA is unconstitutional or that any other amendment similar to the SOHA has been found unconstitutional. So, therefore, as a matter of law, the defendants cannot have violated a clearly-established constitutional right.

Again, on the issue of qualified immunity, ordinarily such motion would be granted without prejudice to give the plaintiffs a chance to try to re-plead but, due to the holding on the SOHA and the fact that qualified immunity has an elevated status in the Court in § 1983 juris prudence which requires that the court consider qualified immunity prior to even any discovery being considered, it is appropriate to grant it at this stage since the Court is ruling on the constitutional issues. The general statements from the cases cited by the plaintiffs must be read in context of the facts before the courts in each case.

Arney involved an action brought for wrongful arrest and false imprisonment arising under section 376.12(7), Florida Statutes (1981), for failing to report an oil spill in the St. Marks River. That the wrong person was arrested was the central contention, coupled with the allegation that the responsible officials knew or should have known that the person arrested was not the "supervisor in charge" or the person responsible for the spills. There was no similarity at all to the allegations at bar.

Hambley, too, involved an action brought for wrongful arrest arising under section 370.75(5), Florida Statutes (1977), for falsifying wholesale seafood records. The First District Court of Appeal upheld the dismissal of the state agency, Department of Natural Resources, for the reason that the state agency is not a "person" within 42 U.S.C. § 1983, but held that the director could be sued as an individual defendant based on the Second Amended Complaint which alleged that he "willfully, illegally and maliciously suspended" Hambley's Shucker-Packer Certificate." *Hambley,* 459 So.2d at 410.

In neither *Arney* nor *Hambley,* was the malicious prosecution claim for damages allowed to stand against the state agency. The allegations in *Hambley* are described as follows:

> However, Count III also names Harmon Shields *as an individual defendant,* alleging that Shields willfully, illegally and maliciously suspended Hambley's certificate without having *afforded him an opportunity to show compliance with 'lawful requirements,'* thereby causing him to incur damages in excess of $5,000 'from interference with the pursuit of

> his livelihood, substantial loss of income, and loss of his customer's confidence.' As far as count III alleges willful and malicious behavior against Harmon Shields, in his individual capacity as a public official it may stand.

459 So.2d at 410 (emphasis added.)

No similar allegations exist here insofar as the named defendants are concerned, nor could exist because the entire thrust of plaintiffs' Second Amended Complaint is that the defendants *are* applying the SOHA as written, and that is what they complain of. As *Hambley,* quoting from *Arney,* stated, "[s]uch officials are immune from liability if they reasonably believed they acted lawfully." 459 So.2d at 411.

Accordingly, defendants' motions to dismiss Counts II and IV and all allegations of the plaintiffs' Second Amended Complaint contained therein for lack of subject matter jurisdiction are granted and Counts II and IV of plaintiffs' Second Amended Complaint are dismissed with prejudice.

Count III

Count III seeks a declaratory judgment and supplemental prospective relief pursuant to chapter 86, Florida Statutes (2006), as to HB-1B. Plaintiffs assert a doubt as to their rights under the roll-back millage legislation provided for in HB-1B.

HB-1B is a budget limitation law enacted during Special Session 2007-B, and does not affect tax impacts or exactions under the SOHA and section 193.155. It controls local government budgets. Having found the SOHA and section 193.155 valid and rejected plaintiffs' contentions of invalidity, plaintiffs' allegations as to the applicability of HB-1B are moot. In fact, HB-1B does not adversely affect plaintiffs in any regard, and plaintiffs have not alleged any impropriety or any challenge to HB-1B in any respect. Plaintiffs' relative assessed value is not changed or altered by HB-1B because it operates on the entire budget without regard to homestead exemption or SOH implications. Count III is also dismissed with prejudice.

Counts V and VI

Count V addresses the remedy of permanent injunctive relief that plaintiffs seek pursuant to section 26.012, Florida Statutes (2006). In light of the Court's holding as to Count I upholding Article VII, Section 4(c), and section 193.155, Count V of plaintiffs' Second Amended Complaint also is dismissed with prejudice.

Count VI seeks permanent injunctive relief pursuant to 42 U.S.C. § 1983. The Court previously herein has dismissed with prejudice Counts II and IV in which plaintiffs sought the remedies provided in 42 U.S.C. § 1983. Similarly, Count VI of plaintiffs'

Second Amended Complaint also is dismissed with prejudice.

Request for Class Representation

In light of the Court's ruling herein, Plaintiffs' request for class action status need not be addressed and is moot.

Defendants' Motions to Strike

Defendants have filed motions to strike exhibits attached to the plaintiffs' Second Amended Complaint and response to the motions to dismiss. The Court finds that the attachments are permitted and denies defendants' motions to strike.

Conclusion

This Court having addressed all contentions made by the plaintiffs' Second Amended Complaint finds that it should be dismissed with prejudice for the reasons herein stated.

This Court wishes to be clear that these rulings are not intended to apply to any issue other than those specifically addressed herein and that it is not the intent of this Court to offer or suggest any opinion on any issue pending in any other Court involving HB-1B, or any other matter, including any relating to the funding of any county, school district, municipality, or the State University System.

NOW THEREFORE, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Defendants' motions to dismiss plaintiffs' Second Amended Complaint on the basis that this Court lacks subject matter jurisdiction are hereby DENIED.

2. Defendants' motions to dismiss plaintiffs' Second Amended Complaint against the defendants Patrick Pilcher individually, Rhonda Skipper individually, Pete Smith individually, Chris Hughes individually, and James Zingale individually are hereby GRANTED and plaintiffs' Second Amended Complaint is dismissed with prejudice for failure to state a cause of action as to each individually.

3. Plaintiffs' Second Amended Complaint alleging that Article VII, Section 4(c), Florida Constitution, and section 193.155, Florida Statutes (2006), are unconstitutional in violation of Article IV. Section 2, U.S. Constitution, Privileges and Immunities Clause and the Right to Travel, fails to state a cause of action and the defendants' motions to dismiss are hereby GRANTED and plaintiffs' Second Amended Complaint, as to these allegations, is dismissed with prejudice.

4. Plaintiffs' Second Amended Complaint alleging that Article VII, Section 4(c), Florida Constitution, and section 193.155, Florida Statutes (2006), are unconstitutional in violation of the Equal Protection

and Due Process Clauses of the 14th Amendment of U.S. Constitution, fails to state a cause of action and the defendants' motions to dismiss are hereby GRANTED and plaintiffs' Second Amended Complaint, as to these allegations, is dismissed with prejudice.

5. Plaintiffs' Second Amended Complaint alleging that Article VII, Section 4(c), Florida Constitution, and section 193.155, Florida Statutes (2006), are unconstitutional in violation of Article I, Section 8, U.S. Constitution, the Interstate Commerce Clause, fails to state a cause of action and the defendants' motions to dismiss are hereby GRANTED and plaintiffs' Second Amended Complaint, as to these allegations, is dismissed with prejudice.

6. Plaintiffs Second Amended Complaint fails to state a cause of action for relief under 42 U.S.C. § 1983, and the Court lacks subject matter jurisdiction for the reason that there is a plain, speedy and adequate remedy under Florida law. Since no relief can be awarded pursuant to 42 U.S.C. § 1983, no attorneys' fees can be awarded under 42 U.S.C. § 1988. Counts II, IV and VI of plaintiffs' Second Amended Complaint are hereby dismissed with prejudice as to the defendants individually and in their official capacities.

7. Plaintiffs' Second Amended Complaint seeking a declaratory judgment and supplemental prospective relief pursuant to Chapter 86, Florida

Statutes (2006), fails to state a cause of action and the defendants' motions to dismiss are hereby GRANTED, and plaintiffs' Second Amended Complaint, as to these allegations, is dismissed with prejudice.

8. Plaintiffs' Second Amended Complaint seeking a permanent injunction pursuant to section 26.012, Florida Statutes (2006), fails to state a cause of action and the defendants' motions to dismiss are hereby GRANTED and plaintiffs' Second Amended Complaint, as to these allegations, is dismissed with prejudice.

9. The defendants' motions to strike the exhibits attached to the plaintiffs' Second Amended Complaint is hereby DENIED.

10. Plaintiffs' request for class action is deemed moot by virtue of this Court's ruling dismiss plaintiffs' Second Amended Complaint with prejudice.

Based upon the foregoing, Final Judgment of Dismissal With Prejudice is entered on behalf of each and every defendant and against each and every plaintiff. Defendants shall go hence without day.

DONE and **ORDERED** in Chambers at Tallahassee, Leon County, Florida, on this the 18th day of October, 2007.

/s/ John Cooper
JOHN C. COOPER
CIRCUIT JUDGE

APPENDIX C – ORDER OF THE FLORIDA SUPREME COURT DENYING REVIEW OF FIRST DISTRICT COURT OF APPEAL OPINION FILED MAY 26, 2010

37 So.3d 847

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida
Jerome K. **LANNING**, et al., Petitioner(s)

v.

Patrick P. PILCHER, et al., Respondent(s)
No. SC09-1796.

May 26, 2010.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R.App. P. 9.330(d)(2).

APPENDIX D - CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Unites States Constitutional provisions at issue are:

Article I, Section 8, Clause 4 – U.S. Constitution

* * *

> Section 8. The Congress shall have power . . . [t]o regulate commerce . . . among the several states. . . .

Article IV, Section 2 – U.S. Constitution

* * *

> Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Fifth Amendment – U.S. Constitution

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

Fourteenth Amendment, Section 1 – U.S. Constitution

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Florida constitutional referendum amendment commonly referred to as Save Our Homes Amendment (SOHA), adopted effective as of January 1, 1995, has been codified in Sec. 4, Art. VII of the Florida Constitution (1968) as follows:

SOHA

SECTION 4. Taxation; assessments.

* * *

(d) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

a. Three percent (3%) of the assessment for the prior year.

b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) No assessment shall exceed just value.

* * *

(7) The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

The Florida "non-claims" statute codified at F.S.A. § 194.171:

194.171. Circuit court to have original jurisdiction in tax cases

(1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. Venue is in the county where the property is located, except that venue shall be in Leon County when the property is assessed pursuant to s. 193.085(4).

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by

the value adjustment board prior to extension of the roll under s. 197.323.

(3) Before an action to contest a tax assessment may be brought, the taxpayer shall pay to the collector not less than the amount of the tax which the taxpayer admits in good faith to be owing. The collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint. Notwithstanding the provisions of chapter 197, payment of the taxes the taxpayer admits to be due and owing and the timely filing of an action pursuant to this section shall suspend all procedures for the collection of taxes prior to final disposition of the action.

(4) Payment of a tax shall not be deemed an admission that the tax was due and shall not prejudice the right to bring a timely action as provided in subsection (2) to challenge such tax and seek a refund.

(5) No action to contest a tax assessment may be maintained, and any such action shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent.

(6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction

of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Appendix E

APPENDIX E – STATISTICAL ANALYSIS OF SOHA'S EFFECT ON NON-RESIDENT TAXPAYERS 2002-2006 AND TABLE OF SOHA'S DISPARATE IMPACT 1995-2006

Analysis and Report of the Effect of the Save Our Homes Amendment (SOHA) on Florida's Ad Valorem Tax Structure for 2002-2006 Prepared by Info Tech Inc., Gainesville, FL

InfoTech, Inc. has collected, analyzed and prepared the data reflected on the attached spreadsheets. The summary outlines the ad valorem property tax impact of Florida's Save Our Home Amendment (SOHA) and implementing legislation over the last five (5) calendar years 2002 through 2006. The data is reported for each of the 67 counties, and for the state as a whole. While the Info Tech's analysis protocol is proprietary, highlights of the results are as follows:

- From 2002-2006, the application of SOHA's caps cumulatively diverted the burden of $8.63 billion in ad valorem taxes from Florida homesteaders to non-homestead property owners.
- From 2002-2006, because of SOHA's caps, Florida homestead property owners paid a total of 20.9% less in cumulative ad valorem taxes than they would have paid if SOHA's caps had not been enacted.
- Because of SOHA's caps, Florida homestead property owners' taxable assets were under-assessed by 24.3% in 2002, 29.4% in 2003,

34.1% in 2004, 39.9% in 2005 and 47.8% in 2006.

- Because of SOHA's caps, Florida homestead property owners paid 87.3% of their fair share (determined without SOHA's caps) of ad valorem taxes in 2002, 84.0% of ad valorem taxes in 2003, 81.34% of ad valorem taxes in 2004, 77.6% of ad valorem taxes in 2005 and 72.0% of ad valorem taxes in 2006.
- As a result of SOHA's caps, non-homestead owners of Florida properties paid excess ad valorem taxes of $307 per parcel in 2002, $463 per parcel in 2003, $615 per parcel in 2004, $823 per parcel in 2005 and $1,236 per parcel in 2006.
- As a result of SOHA's caps, non-residents owning property in Florida paid 114% of their fair share (based on assessments without the caps) of ad valorem property taxes in 2002, 118% in 2003, 121% in 2004, 127% in 2005 and 135% in 2006.
- As a results of SOHA's caps, non-residents owning property in Florida paid an average of $397 more in ad valorem property taxes per parcel in 2002, $566 more per parcel in 2003, $723 more per parcel in 2004, $947 more per parcel in 2005 and $1,425 more per parcel in 2006.
- By operation of SOHA's caps, the county in Florida which cumulatively diverted the most ad valorem property taxes to non-resident

Appendix E

property owners over the period 2002-2006 was *Palm Beach,* where the amount of taxes diverted was *$373 million.*

- By operation of SOHA's caps, the Florida county which cumulatively diverted the least ad valorem property taxes to non-resident property owners over the period 2002-2006 was *Calhoun,* where the amount of taxes diverted was *$20K.*

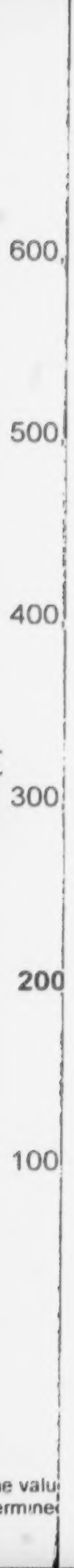
- By operation of SOHA's caps over the period 2002-2006, the 15 Florida counties which cumulatively diverted the most ad valorem taxes to non-residents property owners and the amount of taxes diverted by each county are as follows:

	County	Amount Diverted ($Millions)
1.	PALM BEACH	$373
2.	BROWARD	$265
3.	LEE	$204
4.	DADE	$176
5.	COLLIER	$176
6.	PINELLAS	$169
7.	SARASOTA	$142
8.	HILLSBOROUGH	$ 74
9.	VOLUSIA	$ 70
10.	BREVARD	$ 58
11.	MANATEE	$ 53
12.	MARTIN	$ 50

Appendix E

13.	ORANGE	$ 47
14.	MONROE	$ 42
15.	CHARLOTTE	$ 38

* * *



e valu
ermined

APPENDIX F – SECOND AMENDED COMPLAINT

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

JEROME K. LANNING and **JOYCE A. LANNING,** husband and wife, **MARLOW REESE,** individually and as representatives of similarly situated persons,

Plaintiffs,

v.

CASE NO. 37-2007-CA-000582
CLASS REPRESENTATION

PATRICK P. PILCHER, individually and in his official capacity as Property Appraiser of Walton County, Florida; **Rhonda Skipper**, individually and in her official capacity as Tax Collector of Walton County, Florida; **Walton County**, a political subdivision of the State of Florida; the **Walton County School Board**; **TIMOTHY SMITH**, individually and in his official capacity as Property Appraiser of Okaloosa County, Florida; **CHRIS HUGHES**, individually and in his official capacity as Tax Collector for Okaloosa County, Florida; **Okaloosa County**, a political subdivision of the State of Florida; the **City of Destin**, a municipal corporation; the **Okaloosa County School Board**; and **James Zingale**, individually and in his official capacity as Executive Director of the **Florida Department of Revenue**; and all named Defendants, individually and as representatives of similarly situated persons or entities,

Defendants.

Appendix F

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs, **JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE**, individually and as representatives of a class of similarly situated persons, sue the above named Defendants individually, in their official capacities and as representatives of similarly situated persons or entities, and allege:

GENERALLY

This class action arises out of the manifest injustice imposed by the State of Florida on all non-resident owners of non-homestead property as a result of the Save Our Homes Amendment (Fla. Const., Art. III, § 4(c)) and its implementing statutory scheme (hereinafter referred to as "SOHA"). SOHA caps the increase in annual assessments of homestead properties at the lesser of 3% or the change in the Consumer Price Index reported by the Bureau of Labor Statistics of the U. S. Department of Labor, while the annual assessments of non-homestead properties are required to be made at full market value. This disparity in assessment procedure has caused non-homestead properties to bear huge annual increases in assessed value and related property taxes as Florida vacation and retirement properties have escalated in market value, generally at rates much higher than ordinary residential property spread throughout the state. Regardless of the good intentions that may have motivated the SOHA scheme at its inception in 1992, its cumulative effect now provides revenue for the political subdivisions of the State of Florida and for the Florida Education Finance Program at the expense of thousands of non-homestead property owners, the majority of whom are residents of other states, while protecting residential homesteaders from full participation in a fair ad valorem tax system based upon the assessment of all property at its just market value.

There can be no doubt that each and every state legislature wishes to protect those property owners who can vote for legislators from the rigors of the marketplace and to purchase that protection by inflicting higher taxes on non-residents who cannot vote, but various safeguards of our national unity contained in the United States Constitution prohibit this kind of discrimination. Exploitative and discriminatory tax schemes, particularly those with a significant and disparate burden resting on non-residents, are no different than if Florida burdened interstate commerce by levying tariffs on the importation of goods from other states or restricted the freedom of movement associated with national citizenship by imposing tolls on the rights of non-residents to sojourn in Florida without having to establish residence there.

The SOHA taxing scheme unconstitutionally disrupts the seamless web of national citizenship which has been historically recognized and jealously protected as one of the great unifying factors in our federal union. It is incontrovertible that Florida's unique maritime environment is a national asset that should be available to all United States citizens on equal terms and, further, that Florida's housing market is a national market in which more non-residents own residential property – both in absolute numbers and as a percentage of the population of Florida – than in any other state of the union. It is also true that Florida's popularity with non-residents is the consequence of a decades-long marketing and advertising program, fostered and implemented by the State of Florida, in an attempt to attract tourists and non-resident sojourners whose economic contributions as transients outweigh the cost of the full range of services to which they would be entitled as residents.

SOHA represents a fundamentally unconstitutional encroachment on the rights of all Florida non-residents who have purchased or who desire to purchase residential property in Florida. Though the State of Florida assuredly has the authority to regulate the assessment of *ad valorem* real property taxes, its authority to do so must be exercised in compliance with those provisions of the United States Constitution (i) that assure all citizens the equal protection of the laws, (ii) that bar discrimination against the citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of another state and cannot defend themselves with the ballot box, and (iii) that protect interstate commerce from discrimination and unnecessary burdens that are not warranted by compelling state interests. Specifically, SOHA violates the due process and equal protection guarantees set out in the Fifth Amendment of the United States Constitution and incorporated against the states by the Fourteenth Amendment, the Privileges and Immunities clause of Article Four and the Fourteenth Amendment of the Constitution, the right to travel, and the Interstate Commerce Clause set forth in Article I, § 8, of the Constitution.

Attached to this complaint as Exhibit C is a copy of an article entitled "Has Florida's Save Our Homes Law Reached Its Constitutional Limits?" recently published in the Journal of Multistate Taxation and Incentives, February 2007. There has been previous litigation in Florida questioning the $25,000 homestead exemption authorized by the Florida Constitution (Fla. Const., Art. VII, § 6), e.g., *Reinish v. Clark*, 765 So. 2d 197 (Fla. App. 1 Dist, 2000), but all previous cases have limited their analysis to the effect of the homestead exemption and have not considered the effect of the cap on annual increases in the assessed value of homestead property. In the real world of changing culture, developing markets and increasing population, constitutional law must take into account the degree of an alleged interference with a constitutional right. Constitutional law reflects a balancing of the importance of the challenged governmental interest against the degree of injury inflicted upon the right sought to be protected. A law or governmental program that at one time may have been constitutional can lose that status when its effects grow beyond the original rationale that sustained it or materially encroach upon other important values that were only marginally affected when the constitutionality of such law or program was originally evaluated.

That is a fate that has now overtaken SOHA and makes its discrimination against non-resident property owners in Florida ripe for judicial reconsideration. Some of the information set forth in Exhibit C is staggering in its implications, and the Plaintiffs in this case will prove the validity and relevance of that information and much more concerning the discriminatory effects of SOHA and its inability to survive even the most lax standards of rational basis scrutiny. The following excerpt from Exhibit C, p. 1, illustrates the magnitude of the problem:

> For example, a 1998 state legislative study showed that 43% of the tax savings attributed to SOH went to 16% of the homeowners, and 20% of the savings went to houses valued at $350,000 or greater. In 1998, SOH protected $14 billion in property value from taxes. In 2005, that value was a staggering $246 billion (the 'elephant in the house'). Applying the 1998 findings to the 2005 tax roll produces an estimated $106 billion in protected value going to 16% of homeowners.

Appendix F

The cumulative effects of SOHA have undermined any rational basis for a discriminatory tax scheme that deflects an enormous and growing tax burden to non-residents without achieving its original objective of preserving ordinary homesteads and protecting neighborhood stability. The leading U. S. Supreme Court case that arguably justifies SOHA type property taxation based on acquisition cost rather than changing market value – *Nordlinger v. Hahn,* 505 U.S. 1 (1992) – did not consider the discrimination inherent in SOHA against non-resident property owners or resident second home owners because California's Proposition 13 there at issue does not discriminate against non-resident owners or resident owners of secondary houses.

While SOHA superficially treats residents and non-residents alike by denying the assessment limitation to the second houses of Florida residents, the economic reality is that all Florida residents – both the owners of homesteads and second houses – benefit to a significant degree from SOHA's diversion of the school property tax burden to non-residents. By definition, the resident owning a second house is also the owner of homestead property or else his second house would qualify as his homestead. All school property taxes constitute a funding source for the Florida Education Finance Program, and therefore any owner of homestead property in Florida – whether or not he also owns a second house – benefits from the lower school taxes on homesteads made possible by the disproportionate taxation of non-residents. Moreover, apart from the question of discrimination against non-residents with respect to the burden of property taxation, SOHA violates the "dormant" Interstate Commerce Clause of the United States Constitution by the magnitude of the distortions that it has introduced into the national real estate market of which Florida is a major component. Given the disparity in tax burdens, non-residents can no longer compete on equal terms with Florida residents purchasing homestead properties. SOHA violates the "internal consistency" test of the dormant commerce clause because the adoption of the same discriminatory scheme by every state would massively interfere with the interstate market in property owned by non-residents in each state.

Finally, the magnitude of SOHA discrimination has grown to interfere with the Privilege and Immunities Clause of Article IV and the Fourteenth Amendment of the United States Constitution and the related privilege to travel that is a fundamental right of national citizenship. That right contemplates not only the right to enter Florida on equal terms, but to sojourn therein and to leave on equal terms, without being subject to an economic compulsion to sacrifice one's citizenship in another state so that discriminatory taxation may be avoided.

This is *not* an action challenging the valuation or tax exemption entitlement status ascribed to Plaintiffs' real properties that might arguably be constrained by compliance with the provisions of Fla. Stat., § 1974.171. Instead it is an action challenging the *constitutionality of the SOHA taxation scheme* in and of itself. In that respect, it relies on well-established Florida law that fulfillment of the state's refund procedure is not a condition precedent to an action challenging the facial constitutionality of a tax or tax exemption. This is a class action brought by Plaintiffs, individually and on behalf of all others similarly situated, pursuant to the provisions of Rule 1.220(b)(3), Florida Rules of Civil Procedure, for retroactive and prospective relief in the form of declaratory and injunctive relief, and all other appropriate supplemental relief to which Plaintiffs are entitled, all within the jurisdiction of this Court. Additionally and alternatively, Plaintiffs and Class Members seek remedial redress, both prospectively and retroactively, for violation of their constitutional rights pursuant to 42 U.S. C. §1983.

JURISDICTION, VENUE AND RELATED MATTERS

This Court has subject matter jurisdiction pursuant to Art. I, Sec. 21, Art. V, Sections 5(b) and 20(3) and Art. VII, Sec. 13 (Fla. Const. 1968), Section 86.011, Fla. Statutes (2006) and Section 26.012, Fla. Statutes (2006).

1. Venue is proper in Leon County because the Defendant **JAMES ZINGALE**, Executive Director of

the **FLORIDA DEPARTMENT OF REVENUE**, resides in this County, and said Department is headquartered in this County. The Florida Attorney General is served with a copy of this Second Amended Complaint pursuant to Florida Statutes Section 86.091, *Fla. Stat.* (2006).

PARTIES

2. Plaintiffs, **JEROME K. LANNING** and **JOYCE A. LANNING**, husband and wife, own a parcel of residential property in Walton County, Florida, at 76 Churchhill Drive, Santa Rosa, 32459, Walton County, Florida. Plaintiffs are permanent residents of Birmingham, Alabama, and are not legally eligible or qualified to declare homestead exemption status with respect to their aforesaid residential property in Walton County, Florida. Plaintiffs' *ad valorem* property taxes have increased enormously over the last four (4) calendar years as their property assessments have increased significantly during said period well in excess of three percent (3.0%) per year. Said Plaintiffs have paid all *ad valorem* taxes on their Florida property.

3. Plaintiff, **MARLOW REESE** owns a parcel of residential property in Okaloosa County, particularly described as 830 Gulf Shores Drive, Destin, 32541, Okaloosa County, Florida. Plaintiff is a permanent resident of Montgomery, Alabama, and is not legally eligible or qualified to declare homestead

exemption status with respect to his aforesaid residential property in Okaloosa County, Florida. Plaintiff's *ad valorem* property taxes have increased enormously over the last four (4) calendar years as his property assessments have increased significantly during said period well in excess of three percent (3.0%) per year. Said Plaintiff has paid all ad valorem real property taxes on his Florida property.

4. The term "Plaintiff" as used in this complaint means and includes all persons and entities listed and named as plaintiffs in the caption of this complaint or any amendment thereto and in the text paragraphs thereof, and includes any plaintiffs hereafter added or any amendment, joinder or intervention. The term "Plaintiff Class Member" also means and includes both the named plaintiffs individually and as a representative of the class and any subclass herein described, as well as each member of such class and any subclass. The term "Plaintiffs and Plaintiff Class Members" refers to the "Plaintiffs" and "Plaintiff Class Members" as defined herein.

5. The term "Defendants" as used in this complaint means and includes all persons and entities listed and named as defendants in the caption of this complaint or any amendment thereto and in the text paragraphs thereof, and includes any defendants hereafter added by amendment or otherwise (unless otherwise specific in such amendment). The term "Defendant Class Member" also means and includes both the named defendants individually and as a

representative of the class and any subclass herein described, as well as each member of such class and any subclass. The term "Defendant and Defendant Class Members" refers to the "Defendants" and "Defendant Class Members" as defined herein.

6. Defendant **PATRICK P. PILCHER**, individually and in his official capacity as property appraiser of Walton County, Florida is a proper party because he is instrumental in assessing, levying and implementing the *ad valorem* real property tax assessment process and procedure authorized by the Florida Constitution and the implementing statutory provisions, which are challenged in this proceeding.

7. Defendant **RHONDA SKIPPER**, individually and in her official capacity as tax collector of Walton County, Florida is a proper party because she is instrumental in collecting and disbursing *ad valorem* real property taxes exacted by the assessment and levying process, which is challenged in this proceeding.

8. Defendant **WALTON COUNTY, FLORIDA** is a political subdivision of the State of Florida with power and authority as a taxing authority or district to impose and collect *ad valorem* real property taxes through Defendants **PILCHER** and **SKIPPER** upon the properties of Plaintiffs **JEROME K. LANNING** and **JOYCE A. LANNING**.

9. Defendant **WALTON COUNTY SCHOOL BOARD** is a duly established entity with power and

authority as a taxing authority or district to impose and collect *ad valorem* real property taxes through Defendants **PILCHER** and **SKIPPER** upon the properties of Plaintiffs **JEROME K. LANNING** and **JOYCE A. LANNING**.

10. Defendant **TIMOTHY SMITH**, individually and in his official capacity as property appraiser of Okaloosa County, Florida is a proper party because he is instrumental in assessing, levying and implementing the *ad valorem* real property tax assessment process and procedure authorized by the Florida Constitution and the implementing statutory provisions, which are challenged in this proceeding.

11. Defendant, **CHRIS HUGHES**, individually and in his official capacity as tax collector of Okaloosa County, Florida is a proper party because he is instrumental in collecting and disbursing *ad valorem* real property taxes exacted by the assessment and levying process, which is challenged in this proceeding.

12. Defendant **OKALOOSA COUNTY, FLORIDA** is a political subdivision of the State of Florida with power and authority as a taxing authority or district to impose and collect *ad valorem* real property taxes through Defendants **SMITH** and **HUGHES** upon the property of Plaintiff **REESE**.

13. Defendant **CITY OF DESTIN, FLORIDA** is a municipal corporation with power and authority as a taxing authority or district to impose and collect

ad valorem real property taxes through Defendants **SMITH** and **HUGHES** upon the property of Plaintiff **REESE**.

14. Defendant **OKALOOSA COUNTY SCHOOL BOARD** is a duly established entity with power and authority as a taxing authority or district to impose and collect *ad valorem* real property taxes through Defendants **SMITH** and **HUGHES** upon the property of Plaintiff **REESE**.

15. Defendant **JAMES ZINGALE**, is the Executive Director of the **FLORIDA DEPARTMENT OF REVENUE** and is a proper party with respect to the structuring and implementation of any post-deprivation relief which may be availed to Plaintiffs and Plaintiff Class Members as a result of this proceeding. He is named in his official capacity.

CLASS REPRESENTATION ALLEGATIONS

Class Definitions

16. The class represented by **Plaintiffs** is defined as follows:

> **All non-residents of the State of Florida who, during the relevant time period, have owned a non-homestead residential property in the State of Florida and who have paid ad valorem real property taxes imposed upon said properties during the last four (4) years prior to the filing of this action.**

17. The class represented by **Defendants** is defined as follows:

> **All officials and taxing authorities assessing, levying, implementing, collecting and benefiting from *ad valorem* real property taxes in the State of Florida, exclusive of authorities imposing less than 1 mill in such *ad valorem* real property taxes.**

Numerosity

18. Both classes are so numerous that joinder of the members of the classes would be impractical. Although the exact number of Plaintiff Class Members is personally unknown to Plaintiffs, it is believed that the class will encompass thousands of persons. All Plaintiff Class Members are readily identifiable from information and records in the possession and control of Defendants and Defendant Class Members. The Defendant class consists of the *ad valorem* real property taxing authorities appraising, levying, implementing, collecting and benefiting from *ad valorem* real property taxes in the remaining unnamed counties of the State of Florida, exclusive of taxing authorities imposing less than 1 mill in *ad valorem* real property taxes.

19. The number of members of the alleged Defendant class is so numerous that joinder of individual Defendant Class Members as party defendants to this complaint is impracticable and inconsistent

with the jurisprudential purpose of the class action mechanism for adjudication of such cases. Joinder (even if practicable) would also be contrary to the efficient use of scarce judicial resources, contrary to the public good and inconsistent with the orderly and efficient administration of civil justice between and among litigants.

Typicality

20. Plaintiffs' claims are typical of the claims of the members of the class because Plaintiffs and all Plaintiff Class Members were injured by the same unconstitutional and wrongful conduct and practices of Defendants and Defendant Class Members as alleged herein.

21. The levy, implementation, collection and beneficial use of a materially disparate, adversely proportional and certainly burdensome tax on non-resident owners of residential properties in Florida is a uniform practice among members of the Defendants and Defendant Class Members have acted in such a way that is generally typical of all members of the Defendant class. Moreover, the utilization, extension and perpetuation of a tax exempt shelter status which is weighted beneficially to the duration of a resident's homestead entitlement is a uniform practice adhered to by Defendants and Defendant Class Members with consequential adverse disparate treatment befalling new citizens of this State. Such

conduct makes appropriate the nature of the relief and remedies sought to be imposed on the Defendant class as a whole. The Defendant Class Members have subjected all Plaintiff Class Members who own property in the State of Florida to the same disparate, unfairly, adversely proportional and burdensome tax treatment.

Adequacy

23. Plaintiffs will fairly and adequately protect the interest of the class. The interests of Plaintiffs are coincident with, and not antagonistic to, those of the class. Plaintiffs' co-counsel, Douglas Lyons, Esq., has been admitted to the Bar of the State of Florida for a period of time exceeding thirty (30) years, has been certified as adequate class counsel by state and federal courts, and has extensive litigation experience in consumer issues relating to the automotive industry regarding class actions. The other co-counsel for Plaintiffs are experienced litigators in complex individual and commercial settings, including class action matters generally.

24. The Defendants are members of the class for which they are alleged to be the representatives. The named defendant taxing authorities have levied, implemented, collected, and benefited from and presently intend to assess, levy, implement, collect and benefit from taxes with respect to the Plaintiff Class Members that are, in every material aspect,

similar to those taxes levied, implemented and collected with respect to the Plaintiff class, by the other taxing authorities that comprise the absent Defendant class.

25. The named Defendants are well suited to represent a Defendant class comprised of all other similarly situated *ad valorem* real property taxing authorities or districts. In addition, such other authorities have the option to intervene to compliment the named Defendants in the defense of this action.

26. The named Defendants will be represented by both competent government and retained outside legal counsel. Neither the named Defendants nor their counsel are known or expected to have any conflict or antagonism with other Defendant Class Members that would prevent them or their counsel from providing fair and adequate representation. In asserting their defenses to Plaintiffs' claims herein, the named Defendants would simultaneously be asserting the same defenses that would be available to absent Defendant Class Members. The named Defendants have a true stake in the instant cause and likewise have the capacity and willingness to defend this action fairly, adequately and effectively on behalf of both themselves and the Defendant class.

Commonality and Predominance

27. Questions of law and fact common to the members of the class predominate over questions

which may affect only individual members, if any, in that Defendants and Defendant Class Members have acted on grounds generally applicable to the entire Plaintiff class. The basic, overriding and predominant combined common question of fact and law is whether the Defendant Class Members, by applying the aforesaid SOHA provisions, have levied, implemented, collected and benefited from, or presently assess, levy, implement, collect and benefit from unconstitutionally disparate, adversely proportional and unfairly burdensome *ad valorem* real property taxes upon members of the Plaintiff class as alleged. Included in this common basic question are the following common issues:

a. Whether members of the Defendant class levy, implement, collect and benefit from *ad valorem* real property taxes or possess the ability to lawfully assess, levy, implement, collect and benefit from *ad valorem* real property taxes, the effect of which is discriminatory upon, adversely proportional to and/or unfairly burdensome upon the exercise and enjoyment of the right to travel, to engage in unfettered commerce, or to be a fully endowed citizen of Florida, by any of Plaintiffs and Plaintiff Class Members, which rights are protected by the dormant commerce clause, the privileges and immunities clause, the equal protection clause or the due process clauses contained in the United States Constitution.

b. Whether the imposition and collection of such taxes by members of the Defendant class may be enforced through the imposition of disparate, adversely proportional and unfairly burdensome liens and encumbrances for the failure or refusal to pay such tax assessments.

c. Whether such disparate, adverse and unfairly burdensome tax treatment by the members of the Defendant class are materially similar.

d. Whether each such disparate, adversely proportional and unfairly burdensome *ad valorem* real property taxes were levied, implemented, collected by and benefited each respective taxing authority or district of the Defendant class pursuant to authority granted by the aforesaid SOHA provisions.

e. Whether the Defendants and Defendant Class Members can impose significantly disparate, adversely proportional and unfairly burdensome *ad valorem* taxes against nonresident owners of residential properties in Florida, and, if not;

f. Whether the Plaintiff Class Members are entitled to a remedy for paying such unconstitutional and unlawful disparate, adversely proportional and unfairly burdensome *ad valorem* real property taxes and, if so;

g. The nature of the remedy, both prospective and retroactive, that is available to such Plaintiff Class Members.

28. The only possible individual questions relate to the amount of any actual unlawful tax exactions incurred by the Plaintiff Class Members.

29. Thus, the questions of fact and law are common to all Defendant Class Members and predominate as to all members of the Defendant class over any questions affecting only individual Defendant Class Members. The nature of the Plaintiff class' claims asserted and the legal theories supporting same, and the nature of the remedies sought by the Plaintiff class are all common to and similarly affect each member of the Defendant class, and are all subject to the assertion by such Defendant Class Members of the same defenses thereto, or otherwise predominate over any question of law or fact effecting only individual members of the class.

Superiority

30. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy alleged herein, because such treatment will permit a large number of similarly situated persons to prosecute common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would

engender. Class action treatment will also facilitate notice to and recovery by persons who may be unaware of their legal rights and claims and whose identity is known to Defendant and Defendant Class Members. Further, class action treatment would permit the adjudication of claims by Plaintiff Class Members who have relatively small actual damages and who could not afford to individually litigate a claim against Defendants and Defendant Class Members.

Manageability

31. Plaintiffs are aware of no other pending litigation concerning these issues that has already been commenced by any person who is a member of the proposed class. Further, Plaintiffs know of no difficulty likely to be encountered in the management of this action that would preclude its maintenance as a class action.

32. There would be no management difficulties that would preclude the unitary litigation of this action and the maintenance of both the plaintiff and defendant classes.

33. The claims of the Plaintiff class and the defenses of the Defendant class are consistent and uniform.

34. There are no material facts at issue because this action solely involves a constitutional challenge

to the *ad valorem* real property taxes levied, implemented and collected upon residential properties owned by non-residents of this State.

35. Each of the classes alleged may be readily identified, located and defined because each class is one for which public records exist and is comprised of a finite group of either non-resident property owners or Florida taxing authorities, districts and certain designated county and state officials. Thus, notice to all Plaintiff Class Members and Defendant Class Members may easily and efficiently be accomplished at the time and in the manner established by the Court.

36. Proof of payment of the unconstitutional taxes may be accomplished through the use of uncomplicated objective data and facts available from the records of the Plaintiff Class Members, the records of the Defendant Class Members, or both.

37. Subsequent referral to a Special Master for calculation of individual Plaintiff Class Members' damages is an often used mechanism that is well suited and applicable to this type of action.

38. A unitary action pursuant to class treatment of both proposed classes will serve the beneficial public purposes associated with class actions. Class treatment will permit a large number of Florida *ad valorem* taxing authorities having virtually identical tax provisions to adjudicate the constitutionality ***vel non*** of such taxes in a single forum, efficiently and

without unnecessary repetitious litigation, duplication, expenditure of public funds and consumption of scarce judicial resources. The adjudication of predominant and common issues pursuant to the class action rule would benefit the public and would present an orderly and manageable action for the Court and parties, including absent members of both classes.

39. Class treatment is superior also because a single unified action before this Court will obviate the possibility of repetitious litigation with respect to each of the Florida taxing authorities taxing non-resident taxpaying non-homestead proeprty owners in the same manner as challenged in this action.

40. As for the Plaintiff class, class treatment will permit a large number of similarly, indeed, virtual identically situated persons, to adjudicate their common and typical claims in a single forum simultaneously, efficiently and without duplication and unnecessary expenditure of scarce judicial labor and resources, counsel labor and resources and related expenses.

41. Class treatment will also permit the adjudication of relatively small monetary claims by members of the Plaintiff class who otherwise would find it uneconomical to bear the significant expense that would be required by individual Plaintiff Class Members to prosecute individual actions.

42. Failure to certify the classes alleged and to permit this complaint and these causes of action to be prosecuted as a class action will present a public policy and judicially unacceptable risk that the prosecution of numerous separate claims by individual Plaintiff Class Members who paid the unconstitutional taxes would result in inconsistent or varying adjudications. This would be contrary to the dignity and honor due the judiciary, in that varying and mutually exclusive standards of conduct would be established regarding the named Defendants and taxing authorities comprising the Defendant class.

43. Failure to certify the classes alleged and to permit this complaint and these causes of action to be prosecuted as a class action would adversely affect the public interest, in that an adjudication of any individual Plaintiff Class Member's claim would effectively be dispositive of the legal interests and claims of other Plaintiff Class Members who were not parties to the non-class adjudication, or would substantially impair or impede the ability of other Plaintiff Class Members who were not parties to such adjudication to protect their legal interests.

44. This action is well suited for class management by the Court because there are no inherent conflicts between related Plaintiff Class Members that touch upon the common issues alleged.

45. Adverse parties to this action are well represented by competent Florida Bar members. They

are qualified and oriented to prosecute or defend this action efficiently and consistently with the governing case law material to class actions. Counsel thus will be able to assist the Court in its important oversight role to assure adequacy of representation of the absent members of both classes alleged.

FACTUAL BACKGROUND COMMON TO ALL COUNTS

46. Plaintiffs and prospective Plaintiff Class Members are non-residents of Florida who presently, or recently (within four years preceding the filing of this action), owned non-homestead residential properties throughout the State of Florida.

47. During the relevant period of time, Plaintiffs and Plaintiff Class Members paid *ad valorem* real property taxes on their residential properties based on valuations which have increased significantly in yearly increments in excess of three percent (3%) of the prior year's valuation.

48. As a result of these periodic valuation increases in the value of their residential properties, Plaintiffs and Plaintiff Class Members paid *ad valorem* real property taxes attributable to the ownership of their Florida residential properties which cumulatively represent a much higher percentage of the amount of taxes paid by them previously and well in excess of the cumulative percentage increase in *ad valorem* real property paid by Florida homestead

residential property owners for such similar and comparative period of time.

For example, over the past four years, residents of Florida who qualified for homestead status paid *ad valorem* real property taxes upon assessment valuations which did not exceed incremental increases of three percent (3%) per year, or a cumulative increase of 12.55 percent (12.55%) for the identical four-year period. Yet, assessed valuations and attending *ad valorem* taxes ballooned for all non-homestead owners or properties in Florida during this same period. The problem generated by this disparity is succinctly noted in a publication by a leader of the Florida Legislature styled "Property Tax Relief And Reform Plan," which summary is attached hereto as Exhibit "A." This publication remarks:

> "Over the last several years, escalating property taxes have far outpaced Floridian's ability to pay them. Total property tax levies increased by 99% between Fiscal Years 2000-02 and 2006-07. By comparison, personal income has increased by 44%, and population plus inflation has grown 31%.
>
> Certain elements of the property tax system – while created for valid purposes and to offer meaningful protections – have fostered inequities among taxpayers. The unintended effect of Save Our Homes have resulted in common examples two similar properties in the same neighborhood with very different property tax bills. Also, local taxing

> authorities have increased the burden on non-homestead properties to compensate for homestead savings.
>
> Property taxes have become an obstacle to home ownership and in impediment to job creation, while Florida faces increasing competition for human and economic capital from neighboring states that have more taxpayer-friendly policies."

Section 4, Art. VII of the Florida Constitution (1968) and the implementing statutory regulations contained in §193.155, Fla.Stat. (2005) (hereinafter SOHA provisions), to the extent such provisions cap the annual increase in *ad valorem* real property tax assessments for the Florida owners of homestead properties at three percent (3%) of the assessment for the prior tax year, or at the increase in the consumer prices index ("CPI") for the preceding calendar year, whichever is less, are unconstitutional and unlawful. In particular, the SOHA provisions affect interstate commerce and impinge on the right to travel by adversely discriminating against non-resident owners of Florida residential properties by diverting payment to such non-residents of *ad valorem* real property tax savings generated by durationally weighted tax shelters (hereinafter "sheltered status") accruing in favor of the owners of homesteaded residential properties in Florida. As a result of this unconstitutional "sheltered status" factor, all owners of non-homestead properties pay a significantly disproportionate share of *ad valorem* taxes levied in Florida than they otherwise would if such "sheltered status" did not exist. The particulars of this significant disparity, adversely proportional and unfairly burdensome treatment of non-homestead properties, and particularly the residential properties of non-residential Plaintiff Class Members *vis a vis* homestead property owners, are highlighted county by county in the report prepared by INFO TECH, Inc., a copy of which is attached hereto as Exhibit "B."

Moreover, non-resident residential property owners are further disparately treated because they do not get any benefit from the "sheltered status" treatment afforded homesteaders. This disparity in real property taxes results in non-resident owners of residential properties paying more than a reasonable and fair share of the infrastructure demands of Florida, when compared to homesteaders owning property in this State.

49. Such disparate treatment of non-resident owners of residential properties in Florida and the accompanying unfair diversion to them of excessive costs of the infrastructure demands of Florida, is ongoing, continuing and increasing. Such disparate, adversely proportional and unfair burden has a definite chilling effect on any decision by citizens of the United States, who are not Florida residents, to elect to own residential properties in Florida as second homes, vacation properties, or putative retirement homesteads, and to engage in interstate travel and commerce associated with the enjoyment,

beneficial use and expectations attributable to such ownership.

50. Such disparate, adversely proportional and unfairly burdensome features operate as significant impediments to the free flow of commerce by citizens of the separate States in violation of the "dormant commerce clause" of Article I, Section 8 of the United States Constitution; the privileges and immunities clause of the 14th Amendment of the United States Constitution; and, the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

Such features also violate the "right to travel" protected by the United States Constitution.

51. Aside from the foregoing disparity and unfairness, which is built into Florida's ad valorem tax scheme by the impact and footprint of SOHA, the State of Florida has recently taken legislative steps to implement measures which will operate to "lock-in," as part of Florida's ongoing ad valorem tax scheme, a permanent or embedded tax rate "mark-up" or carry over effect attributable to the presence of the "sheltered status" created by SOHA. The creation of this embedded carry over effect is explained as follows:

a. On June 21, 2007, Florida's Governor signed into law HB 1B, Engrossed, passed by the legislature ostensibly to provide statutory tax relief to all Florida taxpayers because "escalating property taxes were recognized to have outpaced Floridians' ability to pay them." A summary of this legislative fix is contained in the above referenced Exhibit "A" attached.

b. The immediate tax relief occasioned by this legislative package (hereinafter "HB 1B") is to prescribe a millage "rolled-back rate" for each taxing authority or district for tax year 2007-2008, which rate is designed to reflect the millage rate that would have replicated, with some adjustments, the gross *ad valorem* tax revenue generated in fiscal year 2006-2007 for the assessing taxing authority or district.

c. Then, depending on the average rate of tax increases which were implemented by the taxing authority or district over a test period of 2001-2006, the taxing authority or district is required by HB 1B to implement a varying (ranging from 3% to 9%) additional cut in the "rolled-back rate" to produce a "maximum rate."

d. This new statutory mechanism in effect prescribes a revenue cap on the extent an affected taxing authority or district (except school districts) can yearly increase ad valorem property taxes based on the prescribed "rolled-back rate" and any discounts or reductions thereto attributable to the average rate of tax increases implemented by the taxing authorities or districts for the test period 2001-2006. The yearly tax escalator for the taxing authority or district is a factor comprised of the growth in population intermixed with the growth in personal income for a Florida resident. The escalator applies to total revenue generated by the taxing authority, not the millage rate itself.

e. From the foregoing regulatory tax scheme proposed under HB 1B, it is axiomatic that all existing SOHA generated "sheltered-status" for tax year 2006-2007 is built in or ingrained into the prescribed millage "rolled-back rate" and therefore replicated in the rate utilized to reach the applicable capped taxation limit. For example, if the SOHA "sheltered status" for Leon County taxpayers was 10.5% of the total property assessment roll at the outset of tax year 2006, the derived "rolled-back rate" prescribed by HB 1B for tax year 2007-2008 and subsequently is likewise "marked-up" by 10.5% or a comparable percentage due to the imbedded SOHA "sheltered status" factor. Thus, for fiscal year 2007-2008, any non-resident owner of residential property in Leon County will pay *ad valorem* taxes which includes an approximate 10.5% millage rate "mark-up" or carry over effect due to the SOHA "sheltered status" factor for homesteaders. Moreover, if one assumes that a taxing authority or district in Leon County will maximize the increase permitted under the capped structure in each ensuing tax year, the derivative millage rates for each ensuing tax year will likewise contain a "mark-up" or carry over effect which mirrors the "mark-up" contained in the original "rolled-back rate." In other words, it will be extremely unlikely that the actual millage rate for a taxing authority or district will ever decrease below the "rolled-back rate" determined for 2006-2007, given the dire revenue constraints and putative short fall of future tax revenue implemented by HB 1B.

f. Therefore, if it is determined that the durationally weighted and adversely disparate SOHA sponsored "sheltered status" factor is unconstitutional, in addition to retroactive relief, adequate remedial relief also will entail a prospective adjustment to the legislatively prescribed "rolled-back rate" to eliminate its imbedded "mark-up" or carry over attributable to the SOHA "sheltered status" factor.

COUNT I

Declaratory Judgment and Request for Supplemental Retroactive Relief Pursuant to Chapter 86, Laws of Florida

52. This is an action for declaratory judgment pursuant to Sections 86.021 and supplemental retroactive relief pursuant to 86.061, *Fla. Stat.* (2006).

53. Plaintiffs reallege all of the allegations of Paragraphs 1 through 55 above as if specifically set forth herein.

54. Plaintiffs and Plaintiff Class Members are in doubt about the validity and lawfulness of ad valorem property taxes paid by them during the past four tax years. Specifically, Plaintiffs and Plaintiff Class Members contend that all tax assessments against their Florida residential properties for the aforesaid tax years were invalid and unlawful to the extent such assessments were the product of and encompassed the allowance of ad valorem tax "sheltered status" conferred upon owners of homestead properties by operation of the aforesaid SOHA provisions, which "shelter status" was not offered, extended or availed to Plaintiffs and Plaintiff Class Members, thereby offending the following provisions of the United States Constitution:

A.

Violation of the Commerce Clause

55. Article I, § 8, cl. 4 of the United States Constitution provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." This clause is commonly referred to as the "Commerce Clause," and stands for the proposition that the regulation of interstate commerce shall rest solely, and without exception, with the federal government.

While it is true that the SOHA legislation presently contested only regulates commerce and behavior that occurs *within* the borders of the State of

Florida, it is well-established by the negative inference of the commerce clause, that states may not enact regulation which interferes with the federal government's sole control over interstate commerce or create regulatory schemes which would burden a national market, regardless of the local impact of that regulation. This inference, because of its being unstated by the Constitution, is commonly referred to as the "Negative" or "Dormant Commerce Clause."

56. SOHA, like the multitude of invalid state regulations preceding it, casts a pall over a national market, namely the national housing market established by Florida's unique, and uniquely attractive, geographic and climatic attributes. Florida's attempt to artificially control, for the benefit of its own citizens and at the disadvantage of non-residents, what should be either a free market, or at worst a market governed by the federal government under the auspices of its commerce power, is a clear violation of the Dormant Commerce Clause, is an invalid regulation of interstate commerce, and is due to be struck down immediately.

57. Plaintiffs and Plaintiff Class Members, who are non-resident owners of residential properties in Florida, have been significantly affected by the above described disparate, adversely proportional and unfairly burdensome *ad valorem* real property tax treatment visited upon their Florida residential properties and have doubts as to the constitutionality

and lawfulness of the SOHA provisions in causing such features to be occasioned upon them.

58. The designated Defendant taxing authorities or districts, individually, and as representatives of similarly situated taxing authorities or districts throughout Florida, as a result of the aforesaid SOHA provisions, have utilized and benefited from unconstitutional *ad valorem* property taxes paid by Plaintiffs and all Plaintiff Class Members. Moreover said taxing authorities will continue to do so in the future by the perseverance of SOHA's "sheltered status" factor and by the sheltered status "mark-up" or carry over effect imbedded in the millage "rolled-back rate" prescribed and mandated as a revenue capping mechanism by HB 1B.

B.

Privileges and Immunities

59. Article IV, § 2, of the United States Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," and is commonly referred to as the "Privileges and Immunities Clause" of the Constitution. It is incorporated against the states individually by the Fourteenth Amendment, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

60. While the term "Privileges and Immunities" is not defined within the confines of the Constitution itself, the common-law tradition has narrowed those "Privileges and Immunities" down to the basic, fundamental rights enjoyed by every citizen of the United States. At the most basic level, "[t]he section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. Committee for Industrial Organizations*, 307 U.S. 496, 511 (1939). In more expansive terms, the United States Supreme Court has noted that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States. . . . It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness." *Paul v. Virginia*, 75 U.S. 168, 180 (1868). One of these basic, fundamental rights of the non-citizen is the right not to be taxed at exponentially higher rates than the state citizen is taxed. SOHA is the State of Florida's affirmative denial of the Constitution's guarantee of uniform privileges and immunities to each and every national citizen, is violative of the Privilege and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth

Amendment, and is therefore unconstitutional and due to be struck down.

61. Plaintiffs and Plaintiff Class Members, who are non-resident owners of residential properties in Florida, have been significantly affected by the above described disparate, adversely proportional and unfairly burdensome *ad valorem* real property tax treatment visited upon their Florida residential properties and have doubts as to the constitutionality and lawfulness of the SOHA provisions in causing such features to be occasioned upon them.

62. The Defendants and Defendant Class Members, as a result of the aforesaid SOHA provisions, have utilized and benefited from unconstitutional *ad valorem* property taxes paid by Plaintiffs and all Plaintiff Class Members. Moreover said taxing authorities will continue to do so in the future by the perseverance of SOHA's "sheltered status" and by the "sheltered status" "mark-up" or carry over effect that is imbedded in the millage "rolled-back rate" prescribed and mandated as a revenue capping mechanism by HB 1B.

C.

Right to Travel

63. A fundamental right intrinsic to the federalist agreement amongst and between the states and the federal government is the right to unburdened interstate travel. As the United States Supreme

Court has noted, "the right to unimpeded travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union." *United States v. Guest*, 383 U.S. 745, 767 (1966) (Harlan, J., concurring in part and dissenting in part).

64. SOHA constitutes an infringement of the right to travel, because, in addition to unconstitutionally providing the State of Florida a higher level of income at the expense of those non-residents who *do* purchase a home in Florida, it acts as a deterrent to those non-residents who ultimately *do not* purchase a home in Florida. Those non-residents are financially disincentivized from traveling to Florida and purchasing a home, on account of the immensely disparate tax treatment they would receive as a non-resident. In fact, Florida's present tax scheme *guarantees* that, all other factors being equal, a resident can afford to pay more up front for a particular piece of real property than can a non-resident, because the resident can safely rely on the three percent SOHA cap to keep his or her overall cost down over time. On balance, the SOHA sponsored "sheltered status" confers a time weighted benefit or savings to longtime Florida residents, while prohibiting new residents to Florida from equally sharing the "sheltered status" available to long terms residents. Thus, residents in Florida will always be treated differently with more significant cost burdens imposed on residents

inversely to the duration of their residential status. *Zobel v. Williams,* 457 U.S. 55 (1982) (concurring opinion of O'Connor, J.). SOHA represents an enormous burden on interstate travel, is an unconstitutional limitation of the right to travel, and should be struck down.

65. Plaintiffs and Plaintiff Class Members, who are non-resident owners of residential properties in Florida, have been significantly affected by the above described disparate, adversely proportional and unfairly burdensome *ad valorem* real property tax treatment visited upon their Florida residential properties and have doubts as to the constitutionality and lawfulness of the SOHA provisions in causing such features to be occasioned upon them.

66. The Defendants and Defendant Class Members, have utilized and benefited from unconstitutional *ad valorem* property taxes paid by Plaintiffs and all Plaintiff Class Members. Moreover said taxing authorities will continue to do so in the future by the perseverance of SOHA's "sheltered status" and by the "sheltered status" "mark-up" or carry over effect that is imbedded in the millage "rolled-back rate" prescribed and mandated as a revenue capping mechanism HB 1B.

D.

Equal Protection

67. Every citizen of the United States is guaranteed equal protection under the law by the Fourteenth Amendment of the United States Constitution, which states in pertinent part that, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

68. Equal protection requires, at a very minimum, that a state, when enacting a law that discriminates between groups of people, do so only when it has a legitimate state interest, and that discrimination is directly related to furthering that interest.

69. It is clear and unequivocal that SOHA discriminates between resident homesteaders and non-resident property owners. While not so clear, it is equally true that SOHA discriminates, in effect if not in intention, between ALL resident property owners and non-resident property owners, because resident property owners receive a substantial benefit from the SOHA scheme in the form of *lower, subsidized* taxes for their homesteaded property. The excess needed tax funds are simply garnered from the non-resident homeowners, who are harshly exposed to a crushing tax burden by the State.

70. Florida does not have a valid state interest in forcing non-resident "outsiders" to shoulder such a lion's share of its tax burden.

71. Resultantly, non-resident homeowners are discriminated against unconstitutionally and do not enjoy equal protection under the law. SOHA, therefore, is unconstitutional as violative of the guaranteed right of equal protection under the law, and should be struck down.

72. Plaintiffs and Plaintiff Class Members, who are non-resident owners of residential properties in Florida, have been significantly affected by the above described disparate, adversely proportional and unfairly burdensome *ad valorem* real property tax treatment visited upon their Florida residential properties and have doubts as to the constitutionality and lawfulness of the SOHA provisions in causing such features to be occasioned upon them.

73. The classification of resident home owners and non-resident residential property owners – with homesteads receiving tremendous "sheltered status" tax savings while the non-resident homeowners are not only denied such "sheltered status," but also must shoulder the burden of paying for the preferenced status conferred upon homesteaders – is suspect to say the least. Such suspect classification fails applicable scrutiny demanded by the equal protection clause of the United States Constitution.

74. The Defendants and Defendant Class Members, have utilized and benefited from unconstitutional *ad valorem* property taxes paid by Plaintiffs and all Plaintiff Class Members. Moreover said

taxing authorities will continue to do so in the future by the perseverance of SOHA's "sheltered status" and by the "sheltered status" "mark-up" or carry over effect that is imbedded in them millage "rolled-back rate" prescribed and mandated as a revenue capping mechanism by HB 1B.

E.

Due Process

75. All citizens of the United States are guaranteed the right of due process by the Fifth and Fourteenth Amendments of the United States Constitution. This concept is so ingrained in the American legal tradition that explication is unnecessary.

76. Due process requires that, before a state can take a United States citizen's property, there must be some sort of hearing, some sort of *process*, where the citizen can defend his or her rights. SOHA affords no such process. Rather it simply takes an enormous amount of money from non-resident property owners, while at the same time requiring that resident homesteaders pay a far lower amount. The non-resident enjoys a far smaller benefit in return for his or her proportionally higher contribution to the State's coffer. This offense against the non-resident is particularly grievous when considered in context with the fact that the non-resident has no representation in the government, places no burden on the State's

education system, and is faced with the unsavory, and unconstitutional, disproportionate tax burden.

77. Resultantly, SOHA is unconstitutional as violative of the Due Process guarantees of the Fifth and Fourteenth Amendments, and is due to be struck down.

78. The Defendants and Defendant Class Members, have utilized and benefited from unconstitutional *ad valorem* property taxes paid by Plaintiffs and all Plaintiff Class Members. Moreover said taxing authorities will continue to do so in the future by the perseverance of SOHA's "sheltered status" and by the "sheltered status" "mark-up" or carry over effect that is imbedded in the millage "rolled-back rate" prescribed and mandated as a revenue capping mechanism by HB 1B.

79. For the reasons set forth above, Plaintiffs and Plaintiff Class Members have paid unconstitutional exactions in the form of ad valorem real property taxes to the Defendants and Defendant Class Members,, and all similarly situated Class Defendants, during the last four (4) tax years.

80. The Constitution of the State of Florida, particularly Art. I, Sec. 21 and Art. VII, Sec. 24, guarantee that Plaintiffs and Plaintiff Class Members have a right to petition this Court for the redress of their grievances as victims of unconstitutional tax exactions implemented against them by Defendants and Defendant Class Members.

81. To the extent that Section 194.171, *Fla. Stat.* (2006) is sought to be applied by Defendants and Defendant Class Members, as a bar or jurisdictional limit to Plaintiffs' and Class Members' rights to seek judicial redress for the unconstitutional taxes paid by them, said statutory provision is unconstitutional in its purported application.

WHEREFORE, Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Class Members request that the Court enter its judgment declaring, directing and ordering that:

A. The above-identified SOHA provisions are unlawful and unconstitutional to the extent they conferred a tax "sheltered status" to the owners of Florida homestead properties in excess of three (3) percent of each prior year's valuation assessment;

B. All tax assessments levied upon and paid by Plaintiffs and Plaintiff Class Members, to the extent they were the product of or directly attributable to such tax "sheltered status" extended to Florida homestead property owners by the aforesaid unconstitutional SOHA provisions, were invalid, unlawful and void *ab initio*;

C. For retroactive supplemental relief pursuant to Section 86.061, *Fla. Stat.* (2006) and its predecessor, by ordering the Defendants and Defendant Class Members, to disgorge to Plaintiffs and Plaintiff Class Members all such unlawful and invalid ad valorem property taxes paid by them during the aforesaid four (4) tax years;

D. Plaintiffs and Plaintiff Class Members further request that they be awarded pre-judgment and post judgment interest on such disgorged sums, together with taxable costs assessed against Defendants and Defendant Class Members pro rata for prosecuting this action;

E. Plaintiffs and Plaintiff Class Members additionally request that they be awarded reasonable attorney's fees to be paid from all tax sums disgorged;

F. Such other and further relief as may be proper.

G. Furthermore, Plaintiffs pay for judgment in their favor and in favor of the Plaintiff Class Members against the Defendants and Defendant Class Members, where applicable for each claim for relief, as well as general and special relief in the form of an Order as follows:

a. Certifying that this action be maintained as a class action on behalf of the named Plaintiffs and all others similarly situated'

b. Certifying that this action be maintained as a class action on behalf of the named Defendants and all others similarly situated;

c. Appointing the named Plaintiffs and Defendants as class representatives;

d. Appointing counsel for the named Plaintiffs as class counsel for the Plaintiff class;

e. Appointing counsel for the named Defendants as class counsel for the Defendant class;

f. Approving the form of notice to se sent to the respective classes; and

g. Requiring each Defendant Class Member to "piggy-back" the notice of Plaintiffs' class certification to one of its mailings to the Plaintiff Class Members.

COUNT II

RETROACTIVE RELIEF PURSUANT TO 42 U.S.C. §1983

83. This is an alternative cause of action for retroactive relief pursuant to 42 U.S.C. §1983.

84. Plaintiff realleges the general allegations of Paragraphs 1 through 55 above and Paragraphs 56 through 83 of Count I above as if specifically set forth herein.

85. At all times material, Defendants **PILCHER, SKIPPER, SMITH and HUGHES**, and all other similarly situated Defendant Class Members, both in their official and individual capacities, engaged in certain acts and conduct by which Plaintiffs and Plaintiff Class Members were assessed and charged with ad valorem property taxes upon their

Florida residential properties to make up for the unconstitutional tax "sheltered status" conferred upon homestead property owners by the aforesaid SOHA provisions.

86. Said named Defendants and all other similarly situated Defendant Class Members, acting in their individual capacities, pursued a course of conduct designed to exact unconstitutional ad valorem taxes from Plaintiffs and Plaintiff Class Members, which exactions knowingly and predictably resulted in grossly disparate and adverse financial impacts upon Plaintiffs and Plaintiff Class Members, neither the cause and effect of which could be harmonized with settled and established constitutional principles.

87. This relief is requested if it is determined that the remedial allowance provided by the laws of the State of Florida for retroactive relief to Plaintiffs and Plaintiff Class Members is not adequate, plain or efficient for the violation of their § 1983 rights by the above named Defendants and Class Members.

88. Plaintiffs and Plaintiff Class Members have engaged the undersigned attorneys to represent them in the action and are obligated to pay said attorneys a reasonable fee for their services.

WHEREFORE, by application of the supremacy clause of the United States Constitution Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Plaintiff Class Members request that the Court enter its

judgment awarding the relief specifically set for tin Item G. of the "Wherefore Clause" of Count I dealing with the certification of this action as a class action and further determine, order and direct that:

A. The above-identified SOHA provisions are unlawful and unconstitutional to the extent they conferred a tax "sheltered status" to the owners of Florida homestead properties in excess of three (3) percent of each prior year's assessment valuation;

B. The above named Defendants and Defendant Class members, in their official capacities, to structure an adequate methodology for disgorgement by each Defendant taxing authority or district of all illegal and unconstitutional ad valorem real property taxes paid to them by Plaintiffs and Plaintiff Class Members during the four (4) year period preceding the filing of this action; or

C. If relief under B. above is unavailable, to award monetary damages to Plaintiffs and Class Members pro rata against said Defendant taxing officials and similarly situated Defendant Class Members, acting in their individual capacities, for the unlawful and unconstitutional taxes levied, imposed and collected from Plaintiffs and Plaintiff Class Members by said Defendants and Defendant Class Members during said four (4) year period;

D. Award pre-judgment and post judgment interest, taxable costs and attorney's fees pursuant to Section 42 U.S. C. §1988.

E. Grant such other further relief as may be proper.

COUNT III

Declaratory Judgment and Request for Supplemental Prospective Relief Pursuant to Chapter 86, Laws of Florida As to HB 1B

89. This is a cause of action for declaratory judgment and request for supplemental prospective relief pursuant to Sections 86.021 and 86.061, *Fla. Stat.* (2006).

90. Plaintiffs and Plaintiff Class Members reallege the general allegations of Paragraphs 1 through 55 and Paragraphs 56 through 83 of Count I above as if specifically set forth above.

91. Plaintiffs and Plaintiff Class Members are in doubt as to the lawfulness and validity of the millage "rolled-back rate" prescribed by HB 1B in June of 2007, to the extent said millage rate mandatorily includes and encompasses a SOHA generated "sheltered status" carry over effect applicable to Plaintiffs' and Plaintiff Class Members' properties. Specifically, Plaintiffs and Plaintiff Class Members contend that any SOHA oriented "sheltered status," which is locked-in, carried over, ingrained or imbedded in said

prescribed "rolled back rate" is unconstitutional and invalid as applied to the future valuations of Plaintiffs' and Plaintiff Class Members residential properties for the reasons herein above alleged.

92. This challenge by Plaintiffs and Plaintiff Class Members is prospective in nature and does not constitute a dispute as to an ad valorem real property tax assessment under Section 194.171, *Fla. Stat.* (2006). To the extent that Section 194.171, *Fla. Stat.* (2006), however, is sought to be applied by the named Defendants and Defendant Class Members, as a bar or jurisdictional limit to Plaintiffs' and Class Members' rights to seek prospective judicial redress for the unconstitutional taxes mandatorily destined for inclusion in a fixed millage rate imposed by law, such statutory provision is unconstitutional as applied.

WHEREFORE, Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Class Members request that the Court enter its judgment awarding the relief specifically set forth in Item G. of the "Wherefore Clause" of Count I dealing with the certification of this action as a class action and further determine, order and direct that:

A. The above identified SOHA provisions are unlawful and unconstitutional to the extent they conferred ad valorem tax "sheltered status" to the owners of Florida homestead properties in excess of three (3) percent of each prior years' assessment valuation;

B. For supplemental prospective relief pursuant to Section 86.061, *Fla. Stat.* (2006), order and direct that the millage "rolled-back rate" prescribed by HB 1B, to the extent said rate will be applied to Plaintiffs and Plaintiff Class Members residential properties in tax year 2007-2008 and ensuing years, be adjusted to eliminate therefrom any effect attributable to the ad valorem tax "sheltered status" conferred by the unconstitutional SOHA provisions.

C. For supplemental prospective relief, order and direct the Defendant **JAMES ZINGALE**, in his official capacity as Executive Director of the **FLORIDA DEPARTMENT OF REVENUE**, supervise and coordinate the efforts of Defendant taxing authorities and districts, and similarly situated Defendant Class Members, in effectuating the proper elimination of any SOHA "sheltered status" effect from the application of the prescribed millage "rolled-back rate" in each such taxing authority or district in tax year 2007-2008 and ensuing years.

D. Plaintiffs and Plaintiff Class Members request that they be awarded taxable costs against Defendants and Defendant Class Members pro rata for prosecuting this action.

E. Plaintiffs and Plaintiff Class Members additionally request that their counsel be awarded reasonable attorney's fees to be paid from all reasonably ascertainable ad valorem tax savings accruing to Plaintiffs and Plaintiff Class Members from proper adjustment of the aforesaid millage "rolled-back rate" to eliminate the SOHA "sheltered status" effect as applied to their properties; and, that Defendant **JAMES ZINGALE,** in his aforesaid capacity as Executive Director of the **FLORIDA DEPARTMENT OF REVENUE,** be directed to coordinate and supervise the collection and delivery of such duly awarded attorney's fees to Plaintiffs' and Plaintiff Class Members' counsel from future ad valorem taxes imposed upon their properties.

F. Such other and further relief as may be proper.

COUNT IV

Prospective Relief Pursuant to 42 U.S.C. § 1983

93. This is an alternative cause of action for prospective relief pursuant to 42 U.S.C. §1983.

94. Plaintiff realleges the general allegations of Paragraphs 1 through 55 above and Paragraphs 56 through 83 of Count I and Paragraphs 88 through 89 of Count II above as if specifically set forth herein.

95. Unless otherwise directed by this Court, Defendants **PILCHER, SKIPPER, SMITH and HUGHES** and all other similarly situated Defendant

Class Members, together with assistance or oversight of Defendant **JAMES ZINGALE**, most certainly will take action, in both their official and individual capacities, to implement and levy the millage "rolled-back rate" prescribed by HB 1B upon Plaintiffs' and Plaintiff Class Members' residential properties beginning in tax year 2007-2008 and thereafter. The application of said prescribed "rolled-back rate" and its attendant consequences will result in an unconstitutional and unlawful tax levy or charge upon Plaintiffs' and Plaintiff Class Members' residential properties approximately equal to the unconstitutional SOHA sponsored "sheltered status" factor imbedded in said "rolled-back rate," thereby causing unconscionable, disparate and adverse tax treatment of Plaintiffs' and Plaintiff Class Members properties in violation of the aforesaid constitutional provisions.

96. This relief is requested if it is determined that the remedial allowance provided by the laws of the State of Florida is not adequate, plain or efficient to properly redress Plaintiffs' and Plaintiff Class Members' grievances attributable to the future violation of their § 1983 rights by the above named Defendants and Defendant Class Members acting in their individual capacities.

97. Plaintiffs and Plaintiff Class Members have engaged the undersigned attorneys to represent them in the action and are obligated to pay said attorneys a reasonable fee for their services.

WHEREFORE, by application of the supremacy clause of the United States Constitution, Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Plaintiff Class Members request that this Court grant the class action relief requested in Item G of the "Wherefore Clause" of Count I and further determine, order and direct that:

A. The above identified SOHA provisions are unlawful and unconstitutional to the extent they conferred an ad valorem tax "sheltered status" to the owners of Florida homestead properties in excess of three (3) percent of each prior years' assessment valuation;

B. The Defendants **PILCHER, SKIPPER, SMITH and HUGHES**, together with Defendant **JAMES ZINGALE**, both in their official and individual capacities, take appropriate action to adjust the millage "rolled-back rate," authorized and mandated by HB 1B, so as to eliminate therefrom any consequence attributable to a SOHA generated "sheltered status" carry-over effect upon Plaintiffs' and Plaintiff Class Members' residential properties in tax year 2007-2008 and subsequent years.

C. Award taxable costs of prosecuting this action to be paid pro rata by Defendants and Defendant Class Members;

D. Award reasonable attorney's fees pursuant to 42 U.S. C. §1988 to Plaintiffs' and Plaintiff

Class Members' attorneys, with such fees to be assessed as a percentage of the common fund generated by reasonably determined tax savings accruing to Plaintiffs and Plaintiff Class Members from the elimination of the "sheltered status" of the SOHA provisions as a factor in the application of the prescribed millage "rolled-back rate" for tax years 2007-2008 and ensuing years.

E. Grant such other and further relied as may be proper.

COUNT V.

PERMANENT INJUNCTIVE RELIEF UNDER STATE LAW

98. This is a cause of action for permanent injunctive relief pursuant to Section 26.012, *Fla. Stat.* (2006) to restrain violations of the United States Constitution.

99. Plaintiff realleges the general allegations of Paragraphs 1 through 55 above and Paragraphs 56 through 83 of Count I above as if specifically set forth herein.

100. Plaintiffs and Plaintiff Class Members have no adequate remedy at law with respect to the future impact of the application of the aforesaid unconstitutional SOHA provisions.

101. For all of the reasons set forth in Counts I through VII above, the ad valorem tax "sheltered

status" conferred by the subject SOHA provisions is unconstitutional in its present and future impact upon the ad valorem tax assessments of Plaintiffs' and Plaintiff Class Members' residential properties.

102. This is not an action disputing or challenging an existing ad valorem tax assessment contemplated by Section 194.171, *Fla. Stat.* (2006). To the extent that Section 194.171, *Fla. Stat.* (2006), however, is sought to be applied by Defendants and Defendant Class Members, as a bar or jurisdictional limit to Plaintiffs' and Plaintiff Class Members' rights to seek judicial redress to restrain the unconstitutional taxes destined to be assessed against and paid by them, said statutory provision is unconstitutional in its purported application.

WHEREFORE, Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Plaintiff Class Members request that this Court grant the class action relief requested in Item G of the "Wherefore Clause" of Count I and further determine, order and direct that:

A. The above identified SOHA provisions are unlawful and unconstitutional to the extent they conferred an ad valorem tax "sheltered status" to the owners of Florida homestead properties in excess of three (3) percent of each prior years' assessment valuation;

B. Permanently enjoin Defendants and Defendant Class Members from implementing, or permitting to be implemented, any effects attributable to the unconstitutional SOHA provisions as pertaining to ad valorem real property tax assessments against Plaintiff's and Plaintiff Class Members' residential properties for tax year 2007-2008 and all ensuing tax years;

C. Award taxable costs of prosecuting this action to be paid pro-rata by Defendants and Defendant Class Members;

D. Award reasonable attorney's fees for Plaintiffs' and Plaintiff Class Members' attorneys to be paid from tax savings or funds generated as a result of the injunctive relief conferred herein. Direct Defendant **JAMES ZINGALE**, in his official capacity as the Executive Director of the **FLORIDA DEPARTMENT OF REVENUE** to oversee and coordinate the computation of such tax savings attributable to action taken by each Defendant taxing authority or district and to supervise and coordinate the assessment and collection of awarded attorney's fees from future tax assessments against the properties of Plaintiffs and Plaintiff Class Members or a portion of such savings.

E. Grant such other and further relied as may be proper.

VI.

PERMANENT INJUNCTIVE RELIEF UNDER SECTION 42 U.S.C. §1983

103. This is an alternative cause of action for permanent injunctive relief to restrain conduct in violation of 42 U.S.C. §1983.

104. Plaintiffs and Plaintiff Class Members reallege Paragraphs 1 through 55 above and the general allegations of Count I through V above as if specifically set forth herein.

105. Plaintiffs and Plaintiff Class Members have no adequate remedy at law with respect to the future impact of the application of the aforesaid unconstitutional SOHA provisions.

106. Plaintiffs and Plaintiff Class Members have engaged the undersigned attorney to represent them in this action and are obligated to pay them a reasonable fee for their services.

107. This cause of action is sought if the laws of the State of Florida are determined not to allow a plain, adequate and efficient relief to Plaintiffs and Plaintiff Class Members commensurate with their rights as persons aggrieved by the ongoing and anticipated violations of 42 U.S.C. § 1983 by Defendants and Defendant Class Members acting in their individual capacities.

WHEREFORE, by application of the supremacy clause of the United States Constitution,

Plaintiffs JEROME K. LANNING, JOYCE A. LANNING, and MARLOW REESE and Plaintiff Class Members request that this Court grant the class action relief requested in Item G of the "wherefore Clause" of Count I and further determine, order and direct that:

A. The award of all of the injunctive relief set out in Count V above, as if specifically detailed and requested herein, including the award of all costs and reasonable attorneys fees pursuant to 42 U.S.C. §1988.

ATTORNEYS FOR PLAINTIFFS
WILLIAM C. OWEN, LLC

By: ______________________________
William C. Owen
241 Pinewood Dr.
Tallahassee, Florida 32303
(850)513-0600
(850)877-2809 FAX
Fla. Bar No. 0105417

and

James G. Feiber, Jr.
Salter, Feiber, Murphy,
Hutson & Menet, P.A.
PO Box 357399
Gainesville, Florida 32635
(352)376-8201
(352)376-7996 FAX
Fla. Bar No. 114810

and

Appendix F

Douglas S. Lyons
Lyons & Farrar
325 N Calhoun St.
Tallahassee, Florida 32301
(850)222-8811
(850)222-5583 FAX
Fla. Bar No. 128277

and

William M. Slaughter
Haskell, Slaughter, Young
& Rediker, LLC
1400 Park Place Tower
2001 Park Pl. N.
Birmingham, Alabama 35203
(205)251-1000
(205)324-1133 FAX
AL Bar No. ASB8283R67W

and

Thomas T. Gallion, III
Haskell, Slaughter, Young
& Gallion, LLC
PO Box 4660
Montgomery, Alabama 36103
(334)265-8573
(334)264-7945
AL Bar No. ASB5295L74T
